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In The
Supreme Court of the United States

STATE OF HAWAII, *et al.*,

Petitioners,

v.

RICHARD K. LOVELL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

EARL I. ANZAI
Attorney General

DOROTHY SELLERS
CHARLES FELL
NANCY ALBANO
Deputy Attorneys General

425 Queen Street
Honolulu, HI 96813
(808) 589-1450

CHARLES J. COOPER*
MICHAEL W. KIRK
DEREK L. SHAFFER

COOPER & KIRK, PLLC
1500 K Street, N.W.,
Suite 200
Washington, DC 20005
(202) 220-9600

**Counsel of Record*

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Is Title II of the American with Disabilities Act a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' sovereign immunity against private suits for damages?

2. Did the State of Hawaii, by accepting federal funds for its Department of Human Services, waive its sovereign immunity against private suits for damages for violation of Section 504 of the Rehabilitation Act of 1973?

LIST OF PARTIES

Petitioners, defendants-appellants in the court below, are the State of Hawaii and Susan Chandler in her official capacity as the Director of the Department of Human Services of the State of Hawaii.

Respondents are Richard K. Lovell, Douglas D. Delmendo, an incapacitated person by his appointed guardian, Zosima Orillo Delmendo, Helen Y. Hirata, and Albert Lum Ho, Sr., plaintiffs-appellees in the court below.

The United States of America filed a notice exercising its right to intervene pursuant to 28 U.S.C. § 2403(a) in the consolidated *Lovell* and *Delmendo* appeals, and the court of appeals thereafter referred to the United States as an intervenor in at least one order entered in all four cases. However, the records of the Ninth Circuit's clerk's office list the United States merely as an *amicus curiae*, rather than as an intervenor.

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PETITION FOR A WRIT OF CERTIORARI

The State of Hawaii and Susan Chandler, in her official capacity as Director of the Department of Human Services of the State of Hawaii, ("Petitioners") respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit.[1]

OPINIONS BELOW

The opinion of the court of appeals in the consolidated appeals involving respondents Lovell and Delmendo has not yet been reported; it is reprinted in the Appendix ("App.") at 1a. The Memorandum Opinions in the appeals involving respondents Hirata and Lum Ho are not reported; they are reprinted at App. 34a. The opinions of the district court in *Lovell* and *Delmendo* are not reported; they are reprinted at App. 38a. The district court did not issue an opinion in *Hirata* or *Lum Ho*; the judgments are reprinted at App. 72a.

JURISDICTION

The judgments of the court of appeals were entered on September 5, 2002. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution, and the relevant provisions of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.*,

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[1] The court of appeals consolidated the *Lovell* and *Delmendo* appeals, and issued its opinion explaining the judgments in all four cases in the consolidated appeal. *See* App. 20a, n.8. In *Hirata* and *Lum Ho*, the court issued separate unpublished memoranda. *See* App. 34a-35a; 36a-37a. Petitioners seek review of all three judgments in this petition in accordance with this Court's Rule 12.4.

the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.*, and Section 1003 of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, are all reprinted at App. 75a-81a.

STATEMENT

Invoking its authority under Section 5 of the Fourteenth Amendment, Congress has purported to abrogate the States' sovereign immunity against suits brought under two largely identical federal statutes – Title II of the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act of 1973. This Court has twice granted certiorari to consider whether Title II of the ADA is a proper exercise of Congress' power to enforce the Fourteenth Amendment, but failed to resolve the question on both occasions. *Board of Trustees v. Garrett*, 531 U.S. 356, 360 n.1 (2001); *Alsbrook v. Arkansas*, 529 U.S. 1001 (2000) (dismissing certiorari following settlement).

Five Circuits, applying this Court's recent Section 5 jurisprudence, have concluded that Title II is not a proper exercise of the power to enforce the Fourteenth Amendment.[2] Three others have held that Title II is an appropriate exercise of Section 5 power in some cases, but not necessarily in others.[3] Only the Ninth Circuit has

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[2] *Wessel v. Glendening*, ___ F.3d ___, No. 00-6634, 2002 U.S. App. LEXIS 20423, at *10-31 (4th Cir. Sept. 26, 2002); *Reickenbacker v. Foster*, 274 F.3d 974, 978-83 (5th Cir. 2001); *Thompson v. Colorado*, 278 F.3d 1020, 1026-34 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1960 (2002); *Randolph v. Rogers*, 253 F.3d 342, 345 n.4 (8th Cir. 2001); *Walker v. Snyder*, 213 F.3d 344, 346-47 (7th Cir. 2000), *cert. denied*, 531 U.S. 1190 (2001).

[3] *Kiman v. New Hampshire Dep't of Corrections*, 301 F.3d 13, 17-34 (1st Cir. 2002) (Title II claims arising from a constitutional violation may be brought against the States); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 812-15 (6th Cir. 2002) (en banc) (Title II claims sounding in due process may be brought against the States, but those sounding in equal protection may not), *petition for cert. filed*, No. 01-1503 (U.S. Apr. 8, 2002); *Garcia v. S.U.N.Y. Health*

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concluded that Title II properly abrogates the States' sovereign immunity against private suits in all cases. App. 15a-16a; *Hason v. Medical Bd. of Cal.*, 279 F.3d 1167, 1171 (9th Cir.), *reh'g en banc denied*, 294 F.3d 1166 (9th Cir.), *petition for cert. filed*, No. 02-479 (U.S. Sept. 23, 2002).

The Circuits are also split on the closely related question whether the States' acceptance of federal funds has effected a valid waiver of their sovereign immunity against Section 504 claims notwithstanding Congress' attempt to deprive them of immunity without regard to whether or not they have consented. The Second Circuit has held that, in these circumstances, a "§ 504 damage claim against New York fails because New York had not knowingly waived its sovereign immunity from suit" by accepting federal funds. *Garcia v. S.U.N.Y. Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 114-15 (2d Cir. 2001) *see also Douglas v. California Dep't of Youth Auth.*, 285 F.3d 1226, 1227-31 (9th Cir.) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (same), *cert. denied*, 122 S. Ct. 2591 (2002). In contrast, other courts of appeal, including the court below, have held that States are subject to suit in federal court under Section 504 of the Rehabilitation Act if they accept federal funds. *See* App. 16a-17a.

1. The proscriptions imposed by Title II of the ADA are "virtually identical" to those set forth in Section 504 of the Rehabilitation Act. *Garcia*, 280 F.3d at 114. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from the participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." ADA § 202, 42 U.S.C. § 12132. Section 504 similarly states that "[n]o

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Scis. Ctr. of Brooklyn, 280 F.3d 98, 110 (2d Cir. 2001) ("Title II in its entirety exceeds Congress's authority under § 5," but suits for damages nevertheless are permissible against the States where alleged violation is motivated by discriminatory animus.).

otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . ." 29 U.S.C. § 794(a). Indeed, the only difference between the two statutes is that Section 504 applies only to programs receiving federal funds,[4] while Title II of the ADA governs all public entities, including the States.

The remedies afforded for violations of Title II are likewise identical to those provided for violations of Section 504. ADA § 203, 42 U.S.C. § 12133 (adopting "[t]he remedies, procedures, and rights" provided by Section 505 of the Rehabilitation Act for violations of Title II); *see also Barnes v. Gorman*, 122 S. Ct. 2097, 2100 (2002); *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 590 (1999).

Congress has purported to abrogate the States' sovereign immunity against suits brought under both the ADA and Section 504 of the Rehabilitation Act. 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in [a] Federal or State court of competent jurisdiction for violation of [the ADA]."); Rehabilitation Act Amendments of 1986, § 1003, Pub. L. No. 99-506, 100 Stat. 1845, 42 U.S.C. § 2000d-7(a)(1) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973 . . . ."). However, Section 2000d-7(a)(2) limits the remedies "[i]n a suit against a State for a violation of [Section 504]" to those "available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State."

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[4] Congress has defined "program or activity" to include the particular state department or agency that receives federal funds. Rehabilitation Act, § 504(b), 29 U.S.C. § 794(b).

2. These cases arose from Hawaii's implementation in 1994 of an experimental Medicaid pilot project that the Secretary of Health and Human Services, acting pursuant to the authority expressly granted by Congress, specifically authorized. *See* App. 89a-93a; 42 U.S.C. § 1315(a). In general, the Medicaid Act required participating States to provide coverage for medical services to several classes of beneficiaries, including those receiving Aid to Families with Dependent Children, General Assistance, and those receiving Supplemental Security Income for Aged, Blind, and Disabled ("ABD"). *See* App. 3a-4a.

Section 1115 of the Social Security Act, 42 U.S.C. § 1315(a) authorizes participating States to conduct "any experimental, pilot or demonstration project which, in the judgment of the Secretary, is likely to assist in promoting the objectives of" Medicaid. In this provision, Congress authorized the Secretary to "waive compliance with any of the requirements of" a number of specified statutory provisions "to the extent and for the period he finds necessary to enable such State or States to carry out such project." 42 U.S.C. § 1315(a)(1) (1992).

In 1993, Hawaii sought and received approval from the Secretary to launch its QUEST Demonstration project. The Secretary expressly waived a number of statutory Medicaid eligibility requirements, specifically including the provision requiring that benefits be extended to the ABD population. *See* App. 89a-91a. The Secretary explained that waiver of these provisions was necessary "[t]o enable the State to use eligibility standards and requirements that differ from those required by law; to exempt from Medicaid coverage certain individuals who the State otherwise would be required to include under its [Medicaid] plan . . . ." App. 90a-91a. Hawaii implemented QUEST beginning on August 1, 1994.

3. In November 1995, Shea Burns-Vidlak and George Cohn brought an action against Petitioner Susan Chandler, the Director of Hawaii's Department of Human

Services, in the district court seeking prospective injunctive relief. On April 12, 1996, the district court granted plaintiffs' motion for summary judgment as to liability, holding that the exclusion of the ABD population from QUEST violated Title II of the ADA and Section 504 of the Rehabilitation Act. *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 769-73 (D. Haw. 1996). The *Burns-Vidlak* court further held that compensatory damages were available for violations of Title II and Section 504, and "states have no Eleventh Amendment immunity from suit in federal court for violations of § 504 of the Rehabilitation Act or the ADA." *Id.* at 770 (citing congressional enactments purporting to abrogate the States' sovereign immunity, 42 U.S.C. § 2000d-7(a)(1) and 42 U.S.C. § 12202).

On June 27, 1996, the district court granted in part the *Burns-Vidlak* plaintiffs' motion for class certification, holding that "class treatment was appropriate for the already decided question of general liability for compensatory damages and for the undecided question of the State's liability for punitive damages. However, the court directed the individual class members to file separate actions for particularized determinations of the amount of compensatory damages the State owed them." App. 7a-8a.

Accordingly, over 375 members of the *Burns-Vidlak* class brought individual actions against petitioners for violation of Title II of the ADA and Section 504 of the Rehabilitation Act, seeking a total of more than $10 million in compensatory damages arising from their ineligibility for benefits under the QUEST program. The cases brought by respondents were among the first to be tried. In all four cases, petitioners' Answers asserted that respondents' complaints were barred by the doctrine of sovereign immunity and the Eleventh Amendment. App. 82a; 84a; 86a; 88a.[5] In each case, the district court

[5] Respondents argued below that a statement made in response to a question from the trial court in *Burns-Vidlak* waived Hawaii's

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conducted a trial and awarded damages for out-of-pocket medical expenses, loss of enjoyment, emotional distress, and pain and suffering, as well as prejudgment interest and attorneys' fees. *See* App. 8a-9a; App. 34a-35a; App. 36a-37a.

4. On appeal, the Ninth Circuit consolidated *Lovell* and *Delmendo*, and calendared *Hirata* and *Lum Ho* for decision before the same panel. All four cases were argued and initially submitted on November 2, 1999. However, the court withdrew the cases from submission in light of this Court's grant of certiorari in *Alsbrook v. Arkansas*, 528 U.S. 1146, *cert. dismissed*, 529 U.S. 1001 (2000), and subsequently decided to await the Court's decision in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001). After *Garrett* was decided, the court called for supplemental briefing to address Hawaii's claim of sovereign immunity,

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sovereign immunity in these cases. The court of appeals declined to address this claim, App. 17a-18a, and in any case it is wholly without merit. First, even if Hawaii had waived sovereign immunity in *Burns-Vidlak*, such a waiver would not extend to the completely separate suits filed by respondents. Oral argument on summary judgment took place before the *Burns-Vidlak* class was certified, so the statement at most waived immunity as to Burns-Vidlak's claims; there is no basis for injecting counsel's statement into these cases. Second, at the time the statement was made, the State of Hawaii was not a party in *Burns-Vidlak*, so counsel's statement at most gave rise to a waiver of petitioner Chandler's rights. Finally, the statement was made eight days before this Court decided *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), when it was still the law of the land that Congress' Article I powers authorized it to unilaterally abrogate the States' sovereign immunity from suit. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989). In these circumstances, counsel's accurate response to the court's question, which merely acknowledged the then-existing state of the law permitting Congress to subject the State to suits, "is very far from [a demonstration] that the *State* made an 'altogether voluntary' decision to waive its immunity." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 681 (1999) (quoting *Beers v. Arkansas*, 20 How. 527, 529 (1858)).

but in the meantime, other Ninth Circuit panels resolved the sovereign immunity issues presented in this case.

In *Hason*, the court reaffirmed its pre-*Garrett* precedent holding that Title II categorically achieves a valid abrogation of the States' sovereign immunity. 279 F.3d at 1171. Judge O'Scannlain, joined by Judges Kozinski, T.G. Nelson, and Kleinfeld, dissented from the denial of rehearing *en banc*, explaining that application of this Court's reasoning with respect to Title I of the ADA in *Garrett* compelled the same conclusion with respect to Title II. 294 F.3d at 1167-71. Judge O'Scannlain concluded that "*Hason*'s holding, that Title II validly abrogated States' sovereign immunity, period, splits us from seven of our peers that have considered the issue in the post-*Garrett* world. *Every one*, besides us, has gotten the message that something more nuanced is required; we now stand alone." *Id.* at 1171 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (emphasis in original) (citations omitted).

With respect to Section 504, yet another Ninth Circuit panel held "that by accepting federal Rehabilitation Act funds, California has waived its sovereign immunity under the Rehabilitation Act. We adhere to our [pre-*Garrett* Circuit precedent] and conclude that the clear waiver language of the Rehabilitation Act conditions the receipt of federal funds under the Rehabilitation Act upon a state's agreement to forgo the Eleventh Amendment defense." *Douglas v. California Dep't of Youth Auth.*, 271 F.3d 812, 820-21 (9th Cir. 2001), *reh'g en banc denied*, 285 F.3d 1226 (9th Cir.), *cert. denied*, 122 S. Ct. 2591 (2002);[6] *see also Vinson v. Thomas*, 288 F.3d 1145, 1151 (9th Cir.), *petition for cert. filed*, No. 01-1878 (U.S. June 20, 2002).[7]

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[6] The petition for certiorari in *Douglas* (No. 01-1546) did not present the Eleventh Amendment question at issue here.

[7] Hawaii's petition for certiorari in *Vinson* (No. 01-1878) presents the same Section 504 question raised here, while this case also presents the closely related Title II issue. We respectfully submit that judicial

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Judge O'Scannlain, this time joined by Judges Kozinski, Kleinfeld, and Gould, again dissented from the denial of rehearing *en banc*. *Douglas*, 285 F.3d at 1226-31. Emphasizing this Court's teaching that the State's waiver of sovereign immunity must be knowing and intentional, the dissenters maintained that the acceptance of federal funds does not indicate a knowing and intentional State decision to consent to suit in federal court because Congress had independently stripped the State of its sovereign immunity with respect to the very same cause of action and remedy in the ADA. *Id.* at 1229-31 (O'Scannlain, J., dissenting from the denial of rehearing en banc); *see also Vinson*, 288 F.3d at 1157-58 (O'Scannlain, J., dissenting). Judge O'Scannlain emphasized that "the proscriptions of the ADA and § 504 are virtually identical," and, as the Second Circuit had explained, "'a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, since by all reasonable appearances state sovereign immunity had already been lost.'" 285 F.3d at 1231 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (quoting *Garcia*, 280 F.3d at 114).

In the decision below, the Ninth Circuit held that Hawaii's assertions of sovereign immunity against respondents' Title II and Section 504 claims were foreclosed by *Hason* and *Douglas*, respectively. App. 15a-17a. On the merits, the court affirmed the judgments awarding damages to respondents. App. 17a-31a

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economy counsels in favor of resolving both issues together; accordingly, we are today requesting that the Court hold the petition in *Vinson* pending disposition of this case.

REASONS FOR GRANTING THE PETITION

I. THE COURTS OF APPEALS ARE DEEPLY DIVIDED ON THE QUESTION WHETHER TITLE II OF THE ADA IS A PROPER EXERCISE OF CONGRESS' SECTION 5 POWER TO ENFORCE THE FOURTEENTH AMENDMENT.

The question whether Title II of the ADA is a proper exercise of Congress' power to enforce the substantive provisions of the Fourteenth Amendment has given rise to a sustained and deep split among the Circuits. Five courts of appeals have squarely held that because Title II is not an appropriate exercise of Section 5 power, Congress lacked the power to abrogate the States' sovereign immunity against Title II claims. Three others have adopted a case-by-case standard, holding that Title II plaintiffs may sue unconsenting States only in certain circumstances. Only the Ninth Circuit has held that Congress has properly abrogated the States' immunity in all Title II cases. Review in this Court is necessary to provide a uniform answer to this important issue affecting all fifty States.

1. It is settled that Congress may not validly abrogate the sovereign immunity retained by the States under the Constitution through an exercise of its powers under Article I. *See, e.g., Garrett*, 531 U.S. at 364; *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 72-73 (2000); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996). Accordingly, Congress validly abrogated Hawaii's sovereign immunity against respondents' Title II claims if and only if it did so through a valid exercise of its enforcement power under Section 5 of the Fourteenth Amendment. *See, e.g., Garrett*, 531 U.S. at 364-65; *Kimel*, 528 U.S. at 80; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

In *Garrett*, the Court applied the "now familiar principles," 531 U.S. at 365, laid down in cases such as *City of Boerne v. Flores*, 521 U.S. 507 (1997), and *Kimel*, *supra*, to conclude that Title I of the ADA is not a valid exercise of Section 5 power. Specifically, the Court held that (i) Congress had failed to identify a pattern of unconstitutional

discrimination by the States against the disabled, *Garrett*, 531 U.S. at 368-72, and (ii) even if Congress had identified such a pattern, the affirmative obligations the statute imposes were neither congruent nor proportional to the constitutional violations it supposedly was enacted to remedy, *id.* at 372-73. The courts of appeals that have applied this Court's analysis of Title I of the ADA in *Garrett* have reached the same conclusion with respect to Title II.

a. As the Fourth, Fifth, and Tenth Circuits have each concluded, all of the defects in the Title I legislative record identified in *Garrett* also condemn the Title II record. Simply put, Congress had little, if any, evidence supporting the notion that the States (as opposed to municipal governments) had engaged in intentional discrimination against the disabled sufficiently irrational to give rise to a violation of the Equal Protection Clause. First, most instances of alleged discrimination against the disabled in the provision of public services identified in the Title II legislative record "involve local officials and not the states." *Thompson v. Colorado*, 278 F.3d 1020, 1033 (10th Cir. 2001), *cert. denied*, 122 S. Ct. 1960 (2002); *see also Wessel v. Glendening*, ___ F.3d ___, No. 00-6634, 2002 U.S. App. LEXIS 20423, at *18 (4th Cir. Sept. 26, 2002); *Reickenbacker v. Foster*, 274 F.3d 974, 982 (5th Cir. 2001); *compare Garrett*, 531 U.S. at 369 ("It would make no sense to consider constitutional violations on their part, ... when only the States are the beneficiaries of the Eleventh Amendment.").

Second, "the vast majority of incidents discussed in the legislative record involving government 'services, programs, or activities' are refusals by public entities to make accommodations for the disabled." *Thompson*, 278 F.3d at 1033. But it is well settled that "[a]pathetic attitudes and refusals to make accommodations do not usually violate the Fourteenth Amendment." *Id.* at 1034; *see also, Wessel*, 2002 U.S. App. LEXIS 20423, at *18-20; *Reickenbacker*, 274 F.3d at 982; *compare Garrett*, 531 U.S. at 370 (instances of mere failure to accommodate insufficient to establish violations of the Equal Protection Clause that

might support exercise of Section 5 power absent a showing that state inaction was irrational).

b. The Fourth, Fifth, and Tenth Circuits have also concluded that application of the Court's reasoning in *Garrett* necessarily leads to the conclusion that Title II is neither congruent nor proportional to any State violation of the Equal Protection Clause. The Seventh and Eighth Circuits reached the same conclusion prior to *Garrett*. Like Title I, Title II sweeps far beyond the requirements of the Fourteenth Amendment in that (i) it forbids perfectly rational state action that treats disabled persons differently, (ii) it forbids state actions that have a disparate impact upon the disabled in the absence of state intention to discriminate, and (iii) it affirmatively requires states to provide reasonable modifications of their services to accommodate the disabled.

In *Garrett*, the Court identified three facets of Title I that led it to conclude that its rights and remedies were neither congruent nor proportional to the constitutional right at issue. First, "whereas it would be entirely rational (and therefore constitutional) for a state employer to conserve scarce financial resources by hiring employees who are able to use existing facilities," Title I requires employers to accommodate employees with disabilities absent a showing by the employer of "'undue hardship.'" 531 U.S. at 372 (quoting statute). But "even with this exception, the accommodation duty far exceeds what is constitutionally required in that it makes unlawful a range of alternate responses that would be reasonable but would fall short of imposing an 'undue burden.'" *Id.* Second, Title I "makes it the employer's duty to prove that it would suffer such a burden, instead of requiring (as the Constitution does) that the complaining party negate reasonable bases for the employer's decision." *Id.* Third, whereas Title I extends to employer actions that "disparately impact the disabled[,] . . . such evidence alone is insufficient [to give rise to a violation of the Constitution] even where the Fourteenth Amendment subjects state action to strict scrutiny." *Id.* at 372-73.

Once again, Title II of the ADA has each of the features of Title I that drove the conclusion in *Garrett*. First, like Title I's "reasonable accommodation" mandate, "Title II create[s] an affirmative accommodation obligation on the part of public entities that far exceeds the constitutional boundaries" by requiring "reasonable modifications" to covered programs and services to accommodate the disabled. *Reickenbacker*, 274 F.3d at 983; *see also Wessel*, 2002 U.S. App. LEXIS 20423, at *27-28; *Thompson*, 278 F.3d at 1031; *Garcia*, 280 F.3d at 109;[8] *Walker v. Snyder*, 213 F.3d 344, 347 (7th Cir. 2000) (anticipating *Garrett*), *cert. denied*, 531 U.S. 1190 (2001); *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1009 (8th Cir. 1999) (en banc) (same), *cert. dismissed*, 529 U.S. 1001 (2000).

Second, again as with Title I, "whereas under the Fourteenth Amendment the absence of an accommodation would be presumptively permissible with the burden of challenging it squarely on the plaintiff, Title II shifts the burden of proof onto the state to defend the absence." *Garcia*, 280 F.3d at 109-10. This "creat[es] another disjunction between the remedy and injury that contributes to the failure of Title II in the proportionality and congruence analysis." *Reickenbacker*, 274 F.3d at 983.

Third, as with Title I, "Title II focuses on disparate effects divorced from any inquiry into intent." *Garcia*, 280 F.3d at 110. Again, in the wake of *Garrett*, it cannot be disputed that this feature of Title II renders its requirements "far broader" than those imposed by the Constitution. *Id.*

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[8] As explained *infra*, although the Second Circuit held that "Title II in its entirety exceeds Congress's authority under § 5" of the Fourteenth Amendment, 280 F.3d at 110, it nevertheless concluded that "Title II monetary claims . . . can be limited so as to comport with Congress's § 5 authority . . . [by] requir[ing] plaintiffs bringing such suits to establish that the Title II violation was motivated by discriminatory animus or ill will based on the plaintiff's disability." *Id.* at 111.

2. While the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits have all simply applied to Title II the analysis this Court has deployed in *Garrett*, *Kimel*, and *City of Boerne*, three other Circuits have charted a different course, holding that a case-by-case inquiry is necessary to determine whether Title II is a valid exercise of Section 5 power. Compounding the confusion, each of the three has adopted a different standard for determining whether the States' immunity has been validly abrogated in a particular case.

a. The Second Circuit has recognized that this Court's Section 5 precedents lead inexorably to the conclusion that "Title II in its entirety exceeds Congress's authority under § 5." *Garcia*, 280 F.3d at 110. Nevertheless, the court held that suits for damages are permissible against the States where the alleged violation is motivated by discriminatory animus or ill will because such claims "are generally the same actions that are proscribed by the Fourteenth Amendment – i.e., conduct that is based on irrational prejudice or wholly lacking a legitimate government interest." *Id.* at 111.

The Sixth Circuit similarly acknowledged that "the same line of reasoning" adopted in *Garrett* mandates the conclusion that "congressional authority under section 5 to enforce the Equal Protection Clause is limited and will not sustain [Title II of] the Disabilities Act as an exception to Eleventh Amendment state immunity." *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808, 812 (2002) (en banc), *petition for cert. filed*, No. 01-1503 (U.S. Apr. 8, 2002). Nevertheless, the court believed that Title II claims may be brought against the States when plaintiff's theory of the case sounds in due process rather than in equal protection. *Id.* at 813-18. The Sixth Circuit accordingly reversed the judgment because plaintiff's theory "appear[ed] to permit the jury to find in favor of the plaintiff if it finds discrimination against him or exclusion from public proceedings based on equal protection principles." *Id.* at 816. The court then ordered a new trial to consider a claim "based on retaliation or unreasonable

exclusion from judicial proceedings based on disability in a due process-type claim." *Id.*

The First Circuit has drawn yet a third line, holding that "Congress acted within its powers in subjecting the states to private suits under Title II of the ADA, at least as that Title is applied to cases in which a court identifies a constitutional violation by the state." *Kiman v. New Hampshire Dep't of Corrections*, 301 F.3d 13, 24 (1st Cir. 2002). The court did not reach the question whether such suits may go forward in the absence of a constitutional violation. *Id.* The First Circuit declined to examine the legislative record underlying Title II to determine whether Congress had identified a pattern of unconstitutional actions by the States. *Id.* at 28; *cf. Garrett*, 531 U.S. at 368-72. The court also did not attempt to determine whether Title II is congruent and proportional to the constitutional violations it supposedly was enacted to remedy. *Cf. Garrett*, 531 U.S. at 372-73. Instead, the First Circuit believed that this Court's recent Section 5 jurisprudence left open the holding it adopted because the particular facts before this Court in each case did not disclose a violation of the Constitution. *Kiman*, 301 F.3d at 21-22 (reviewing *Garrett*, *Kimel*, *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999)).

b. Each of the case-by-case approaches ignores the basic legal question presented: is the statute at issue "appropriate *legislation*" to enforce the substantive provisions of the Fourteenth Amendment? U.S. CONST. amend. XIV, § 5 (emphasis added). This case-by-case analysis of the particular facts alleged to have violated Title II is contrary to the consistent, statute-by-statute approach this Court has taken. The Court's settled rule that Congress lacks the power under Section 5 to enact legislation "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," *City of Boerne*, 521 U.S. at 532, necessarily presupposes the possibility that overly broad legislation may sweep in the

occasional constitutional violation. That bare possibility is not enough to save such a statute under this Court's precedents.

Indeed, the court of appeals rulings in *Kiman*, *Popovich*, and *Garcia* call into question the specific results reached in this Court's cases. May suits be brought against the States for violation of Title I of the ADA when a disabled plaintiff alleges that an adverse employment action was motivated by discriminatory animus or ill will? *Compare Garcia*, 280 F.3d at 111, *with Garrett, supra*. May suits be brought against the States for violation of Age Discrimination in Employment Act when a plaintiff alleges that an adverse employment action violated his due process rights? *Compare Popovich*, 276 F.3d at 813-18, *with Kimel, supra*.

Moreover, the case-by-case approach brings uncertainty to an area of the law that demands predictability. The States' constitutionally guaranteed right to be free not simply from liability and damages, but also from the burden and indignity of suit would be hollow indeed if availability of sovereign immunity turned on the case-by-case, fact specific inquiries adopted by the First, Second, and Sixth Circuits.[9]

3. Unlike all of the other courts of appeals to consider the issue in the wake of *Garrett*, the Ninth Circuit has made no effort even to consider impact of this Court's analysis of Title I upon the Title II question. In *Hason*, 279 F.3d at 1170-71, the court summarily rejected the State's argument that *Garrett* required reconsideration of prior circuit precedent upholding Title II suits against the States. The court confined its discussion entirely to the observation that this Court had declined to decide the Title II question, and "therefore" held that "the Eleventh

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[9] While Hawaii believes the case-by-case methodology is erroneous for the reasons stated in the text, adoption of any of the tests advanced by the First, Second, and Sixth Circuits would compel reversal of the judgments in these cases.

Amendment does not bar [plaintiff's] Title II claims" against the State. *Id.* at 1171.

As Judge O'Scannlain convincingly demonstrated, "[t]his logic breaks down . . . [for] it does not follow that because *Garrett* did not invalidate Title II, our prior case law upholding it remains relevant. For it is *not* just the *holding* of Garrett that matters; we must also be mindful of the *approach* the Court set forth there." 294 F.3d at 1170 (O'Scannlain, J., dissenting from denial of rehearing en banc) (emphasis in original). Wholly apart from the need to resolve the circuit split, the Ninth Circuit's resolute refusal to even consider the analytic framework adopted by this Court warrants correction. *See id.* at 1167 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (Ninth Circuit's ruling "all but invites a grant of certiorari and reversal for putting us out of step with the Supreme Court *and creating a split with every other circuit to have considered the issue*") (emphasis in original).

4. In view of the disarray in the Circuits, it cannot be seriously disputed that, as the Solicitor General has twice put it, the question whether the States are subject to private suits under Title II of the ADA "is an important question that may merit the review of this Court at the appropriate time and in the appropriate case." Brief for the United States in Opposition in *Court of Common Pleas v. Popovich*, Nos. 01-1503 & 01-1517, at 10; Brief for the United States in Opposition in *Thompson v. Colorado*, No. 01-1024, at 6, *cert. denied*, 122 S. Ct. 1960 (2002).[10] Indeed, as previously noted, this Court has twice granted

[10] The Solicitor General nevertheless urged the Court to deny review in both *Thompson* and *Popovich*, arguing that they both suffered from "significant jurisdictional, statutory, and prudential barriers to granting plenary review. . . ." Brief for the United States in Opposition in *Court of Common Pleas v. Popovich*, Nos. 01-1503 & 01-1517, at 11-25; *see also* Brief for the United States in Opposition in *Thompson v. Colorado*, No. 01-1024, at 7-14, *cert. denied*, 122 S. Ct. 1960 (2002). None of these barriers to review exists in this case.

certiorari to consider the issue, but was unable to reach it on both occasions. *See Garrett*, 531 U.S. at 360 n.1; *Alsbrook v. Arkansas*, 528 U.S. 1146, *cert. dismissed*, 529 U.S. 1001 (2000).

This case provides an especially appropriate vehicle for the Court finally to resolve the issue. First, by presenting both the Title II question and the question whether the States waive their immunity against private suits under Section 504 of the Rehabilitation Act, this case enables the Court to resolve once and for all the question whether private parties may sue the States in federal court for discrimination on the basis of disability in public programs. Conservation of this Court's limited resources counsels strongly against resolving these closely related circuit splits on a piecemeal basis.

Moreover, this is not a case of discrimination against the disabled arising from bad faith or hostile animus. Rather, this suit implicates the core purpose underlying the constitutional doctrine of sovereign immunity: to protect the States (and their taxpayers) from exposure to "private suits for money damages [that] would place unwarranted strain on the States' ability to govern in accordance with the will of their citizens." *Alden v. Maine*, 527 U.S. 706, 750-51 (1999); *see also Garrett*, 531 U.S. at 375 (Kennedy, J., concurring) ("States can, and do, stand apart from the citizenry. States act as neutral entities, ready to take instruction and to enact laws when their citizens so demand."). These cases well illustrate the concern identified by the Court, for they arose from the State's good faith effort to develop an experimental program expanding Medicaid coverage to the working poor. *See Burns-Vidlak*, 939 F. Supp. at 773 ("The Court recognizes that the State made a good faith effort to implement improved and more cost effective health care services through QUEST."). This effort was specifically authorized by an Act of Congress and approved after extensive review by the Secretary of Health and Human Services. *See* 42 U.S.C. § 1315(a)(1) (1992); App. 89a-91a. The need for sovereign immunity is at its zenith in cases like this that threaten crippling financial liability that would discourage

the States from experimenting with innovative public policy programs.[11]

II. THE NINTH CIRCUIT'S SECTION 504 RULING CONFLICTS WITH BOTH THE SECOND CIRCUIT'S DECISION IN *GARCIA* AND WITH THIS COURT'S CONCLUSION THAT THE STATUTE PURPORTING TO INVITE THE WAIVER IS AMBIGUOUS.

This Court has "long recognized that a State's sovereign immunity is 'a personal privilege which it may waive at pleasure.'" *College Sav. Bank*, 527 U.S. at 675 (quoting *Clark v. Barnard*, 108 U.S. 436, 447 (1883)). Consistent with the constitutional magnitude of this right, however, "[t]he test for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985). The Court will not find consent to suit unless "the State makes a 'clear declaration' that it intends to submit itself to our jurisdiction." *College Sav. Bank*, 527 U.S. at 676 (quoting *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944)); *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) ("*Pennhurst II*") (State's consent to suit in federal court must be "unequivocally expressed"). As with the waiver of any other constitutional right, the Court has held that an effective waiver of sovereign immunity requires an "'intentional relinquishment or abandonment of a known right or privilege.'" *College Sav. Bank*, 527 U.S. at 682 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

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[11] As the Court has repeatedly noted, the countervailing interest in enforcing federal law can be fully vindicated "by the United States in actions for money damages, as well as by private individuals in actions for injunctive relief under *Ex parte Young*, 209 U.S. 123 (1908)." *Garrett*, 531 U.S. at 374 n.9.

While the Court has never so held, *dicta* in a number of its cases have suggested that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions [including, presumably, waiver of sovereign immunity] that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Sav. Bank*, 527 U.S. at 686. But the Court has specifically held that "mere receipt of federal funds cannot establish that a State has consented to suit in federal court." *Atascadero*, 473 U.S. at 246-47.

Accordingly, for acceptance of federal funds to give rise to a waiver of sovereign immunity, essential preconditions must be satisfied. First, the statute purporting to exercise the spending power in this fashion must "manifest[ ] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Id.* at 247. Such a clear statement is essential to informing a State's waiver. "There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) ("*Pennhurst I*").[12] Second, the State's acceptance of the money must clearly and unambiguously evidence its knowing intention to relinquish its immunity. *See, e.g., College Sav. Bank*, 527 U.S. at 682.

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[12] Indeed, the Court has insisted upon such clarity as necessary to preserve "'[t]he legitimacy of Congress' power to legislate under the spending power,'" even in cases where the recipient is not a State said to have waived an independent constitutional right to sovereign immunity. *Barnes*, 122 S. Ct. at 2101 (quoting *Pennhurst I*, 451 U.S. at 17). Where, as here, acceptance of federal funds is claimed to effect a waiver of sovereign immunity, the clear statement rule necessarily applies with even greater force.

Review is warranted in this case because the decision below conflicts with the Second Circuit's holding in *Garcia*; acceptance of federal funds does not manifest a clear and voluntary waiver of sovereign immunity against Section 504 claims because Congress has not given the States an option that they may freely accept or reject. Moreover, the Ninth Circuit's ruling is inconsistent with this Court's conclusion, reached in the corresponding context of federal sovereign immunity, that the statute said to have invited the States to waive their sovereign immunity, 42 U.S.C. § 2000d-7(a)(2), is ambiguous as to whether money damages are authorized. *See Lane v. Pena*, 518 U.S. 187, 198-200 (1996). Finally, certiorari should be granted to permit the Court to resolve the question presented but not resolved two Terms ago, whether "implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear statement rule of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)." *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 684-85 (1999) (Kennedy, J., dissenting)).

A. The Decision Below Conflicts with the Second Circuit's Decision in *Garcia*.

Acceptance of Rehabilitation Act funds could not give rise to a valid waiver of sovereign immunity during the period at issue here because the States could not have understood that, by taking the federal money, they were relinquishing sovereign immunity that they otherwise enjoyed. It is settled that waiver of a State's sovereign immunity, like waiver of any other constitutional right, requires the "'*intentional* relinquishment or abandonment of a *known* right or privilege.'" *College Sav. Bank*, 527 U.S. at 682 (citation omitted) (emphases added). When Hawaii accepted the federal funds that purportedly effected a waiver of its sovereign immunity against suits for discrimination against the disabled in any program or activity, Congress had *already purported to deprive* the State of its immunity against such suits in Title II of the

ADA. *See* 42 U.S.C. § 12202 ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act.").

Because Congress purported to unilaterally abrogate the States' immunity against suits for discrimination against the disabled under Title II, Hawaii could not have "intentionally relinquished" its sovereign immunity against such suits under Section 504, for it necessarily believed that it had none to relinquish. In such a circumstance, there could be no waiver of sovereign immunity, which, "no less than the right to trial by jury in criminal cases, is constitutionally protected." *College Sav. Bank*, 527 U.S. at 682.

The alleged violations of the Rehabilitation Act at issue in this case ended in March 1996. *See* App. 6a, n.2. This Court did not decide *Garrett* until four years later, in February 2001; as both the Second Circuit and Judge O'Scannlain have explained, before *Garrett*, the States had no "colorable basis" to suspect that, by accepting federal funds, they were relinquishing sovereign immunity under the Rehabilitation Act that they might otherwise remain constitutionally entitled to assert under the ADA. *Garcia*, 280 F.3d at 114 n.4; *Douglas*, 285 F.3d at 1229-30 (O'Scannlain, J., dissenting from denial of rehearing en banc). Indeed, even today, the States in the Ninth Circuit have reason to question whether acceptance of federal money relinquishes a right they otherwise enjoy, for the Ninth Circuit has maintained its view Congress validly abrogated the States' sovereign immunity against claims under Title II of the ADA. *Hason*, 279 F.3d at 1171. Thus, according to the Ninth Circuit, Hawaii is susceptible to suits such as those brought by respondents regardless of whether it chooses to accept or reject federal funds.

Only by ignoring the relevant inquiry altogether did the court of appeals (and the Circuits it has joined) find a valid waiver. The one Circuit that has actually asked whether States' supposed waiver of sovereign immunity

under the Rehabilitation Act satisfied the relevant standard – as opposed to skipping over this question – has held that it does not. In *Garcia*, the Second Circuit held that New York did not waive its sovereign immunity by taking Rehabilitation Act funds. "[A] state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, *College Sav. Bank*, 527 U.S. at 682, since by all reasonable appearances state sovereign immunity had already been lost." 280 F.3d at 114. After all, "Title II of the ADA was reasonably understood to abrogate New York's sovereign immunity," and "the proscriptions of Title II and § 504 are virtually identical." *Id.*

The Second Circuit correctly found that the contrary decisions of other circuits

> are unpersuasive because they focus exclusively on whether Congress clearly expressed its intention to condition waiver on the receipt of funds and whether the state in fact received the funds. None of these cases considered whether the state, in accepting the funds, believed it was actually relinquishing its right to sovereign immunity so as to make the consent meaningful as the Supreme Court required in *College Savings Bank*, 527 U.S. at 682.

Id. at 115 n.5 (citing *Jim C. v. United States*, 235 F.3d 1079, 1081-82 (8th Cir. 2000) (en banc), *cert. denied*, 533 U.S. 949 (2001), and *Clark v. California*, 123 F.3d 1267, 1271 (9th Cir. 1997)).[13] Likewise, the dissenters from the

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[13] In addition to the Eighth and Ninth Circuits, the Third, Sixth, Seventh, and Tenth Circuits have held that acceptance of federal funds waives State sovereign immunity against Section 504 claims. *See Koslow v. Pennsylvania*, 302 F.3d 161, 169-72 (3d Cir. 2002); *Robinson v. Kansas*, 295 F.3d 1183, 1189-90 (10th Cir. 2002); *Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626, 628 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 2588 (2002); *Stanley v. Litscher*, 213 F.3d 340, 344 (7th Cir. 2000). None of these courts inquired, as the Second Circuit did in *Garcia*, whether the acceptance evidenced the "'*intentional* relinquishment or

(Continued on following page)

Ninth Circuit's denial of rehearing en banc in *Douglas* explained that those contrary decisions fail to "reconcile the tension between Spending Clause and sovereign immunity jurisprudence," whereby the Congress is free to induce waiver by the States, but any such "waiver of a constitutional right must be intentional and knowing." 285 F.3d at 1231 (O'Scannlain, J., dissenting from denial of rehearing en banc); *see also Garrett v. University of Alabama at Birmingham Bd. of Trustees*, No. 97-AR-0092-S, 2002 U.S. Dist. LEXIS 16858, at *16-17 (N.D. Ala. Sept. 4, 2002) (adopting Judge O'Scannlain's view to dismiss plaintiff's Section 504 claim on remand from this Court). Review is warranted to resolve this square conflict among the Circuits as to when the States' constitutional right to immunity from suit will be deemed waived.

B. The Ninth Circuit's Ruling Is Inconsistent with This Court's Conclusion that Section 2000d-7(a) Is Ambiguous.

In *Lane v. Pena*, this Court held that "[t]o sustain a claim that the [federal] Government is liable for awards of monetary damages, the waiver of sovereign immunity must extend unambiguously to such monetary claims." 518 U.S. at 192; *see also id.* at 197 ("'[W]here a cause of action is authorized against the federal government, the available remedies are not those that are "appropriate," but only those for which sovereign immunity has been expressly waived.'") (quoting Government's brief). Indeed, this Court recently extended this principle to Section 504 claims brought against *non-States*, holding that just as the Court has "applied the contract-law analogy in finding a damages remedy available in private suits under Spending Clause legislation[,] . . . [t]he same analogy applies we think, in determining the *scope* of damages remedies."

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abandonment of a *known* right or privilege.'" *College Sav. Bank*, 527 U.S. at 682 (emphases added) (citation omitted).

Barnes, 122 S. Ct. at 2101 (emphasis in original). Where Congress is not only regulating under the Spending Clause, but also purporting to invite a waiver of a Constitutional right, this Court's precedents require exacting application of the clear statement rule. *See, e.g., Atascadero*, 473 U.S. at 241, 246-47; *Pennhurst II*, 465 U.S. at 99.

Moreover, it is now settled that State assertions of sovereign immunity are entitled to the same dignity as those made by the federal government. *See Alden*, 527 U.S. at 749-50 ("In light of our constitutional system recognizing the essential sovereignty of the States, we are reluctant to conclude that the States are not entitled to a reciprocal privilege" to the immunity enjoyed by the federal government.); *College Sav. Bank*, 527 U.S. at 682 ("[T]he context of federal sovereign immunity [is] obviously the closest analogy" to state sovereign immunity.). This Court has also held that in order for Congress to condition funds upon a waiver of state sovereign immunity, "it must do so unambiguously." *Pennhurst I*, 451 U.S. at 17. Thus, any act of Congress purporting to condition a federal grant upon States' consent to be "liable for awards of monetary damages . . . must extend unambiguously to such monetary claims." *Lane*, 518 U.S. at 192.

The 1986 amendment to the Rehabilitation Act, however, does not "unambiguously" state that any waiver of sovereign immunity would extend to suits for money damages. The first paragraph of 42 U.S.C. § 2000d-7(a) provides simply that "[a] State shall not be immune under the Eleventh Amendment . . . from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." Even if that language alerts States that acceptance of federal funds exposes them to suit in federal court, it surely says nothing about the possibility of monetary damages.

Instead, only the second paragraph of Section 2000d-7(a) addresses specific remedies, and it is *entirely ambiguous* regarding whether it exposes States to claims for monetary damages. It provides that, "[i]n a suit against a State for a violation of [Section 504], remedies (including

remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). There can be no reasonable dispute that this provision is ambiguous, because this Court has already held that it is.

In *Lane*, the Court stated that the relevant sentence can plausibly be read "to subject the States to the scope of remedies available against *either* public or private § 504 defendants, whatever the *lesser* (or perhaps the greater) of those remedies might be." 518 U.S. at 199 (second emphasis added). In other words, if remedies are not available against some public entities (for example, federal agencies), then they are likewise not available against the States; and a litigant may not seek from the State the greater remedies – namely, money damages – available against private defendants under Section 504. Indeed,

> if the same remedies are available against all governmental and nongovernmental defendants under § 504(a), the "public or private" language is entirely superfluous. Congress could have achieved the result [of subjecting states to the full remedies available against a private defendant] simply by subjecting States to the same remedies available against "every other entity," without further elaboration.

Id. at 199 (citation omitted). Because *Lane* holds that monetary damages for violation of Section 504 are not available against federal public entities, neither are they available against States.

To be sure, this Court in *Lane* said that Section 2000d-7(a)(2) could "perhaps" be read to subject States to the "greater" set of remedies (i.e., those available against private entities, including money damages); the Court also said that "public entities" could be read to refer exclusively to non-federal public entities. *See* 518 U.S. at 199. But the mere existence of competing readings, each of which is plausible, necessarily demonstrates the absence of the clear statement that is required in order to put the States

on notice that acceptance of federal funds effects a waiver of sovereign immunity. As this Court held in *Lane*, Section 2000d-7(a) "is not so free of ambiguity that we can comfortably conclude, based thereon, that Congress intended to subject the Federal Government to awards of monetary damages for violations of § 504(a) of the Act." 518 U.S. at 200. Because of that same ambiguity, Congress has not set forth a clear statement notifying the States that accepting Rehabilitation Act funds waives sovereign immunity with respect to claims for monetary damages.

This Court has already instructed in *Alden* and *College Savings Bank* that the constitutional status of the sovereign immunity of a State corresponds with that of the federal government; in *Pennhurst I* that an "unambiguous" statement is prerequisite to a waiver of States' sovereign immunity, just as it is to a waiver of federal sovereign immunity; and in *Lane* that 42 U.S.C. § 2000d-7(a)(2) is too ambiguous to effect waiver of federal sovereign immunity with respect to money damages. Certiorari is warranted because the decision below, authorizing a suit for money damages, is contrary to these instructions.

C. Review Is Warranted to Consider Whether the Clear Statement Rule Prohibits Implied Causes of Action Against the States.

Section 505(a)(2) of the Rehabilitation Act provides that the remedies for violations of Section 504 shall be those available under Title VI. "Although Title VI does not mention a private right of action, [this Court's] prior decisions have found an *implied* right of action, and Congress has acknowledged this right in amendments to the statute, leaving it 'beyond dispute that private individuals may sue to enforce' Title VI." *Barnes*, 122 S. Ct. at 2100 (emphasis in original) (quoting *Alexander*, 532 U.S. at 280) (citation omitted). Nevertheless, because Congress has not expressly created a cause of action, this Court has held that such suits may not be brought against the United States. In *Lane* the Court rejected the plaintiff's argument that the Court's decisions establishing a private

cause of action under Title VI also "establish a waiver of the Federal Government's sovereign immunity against monetary damages awards for violations of § 504(a)." 518 U.S. at 191. Reading an implied waiver of sovereign immunity into the Rehabilitation Act, the Court held, would contradict the "requirement firmly grounded in our precedents: A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text, and will not be implied." *Id.* at 192 (citations omitted).

Just as Congress must clearly state its intention to waive the federal government's own sovereign immunity, this Court has consistently required Congress to "manifest[] a clear intent to condition participation in the programs funded under the Act on a State's consent to waive its constitutional immunity." *Atascadero*, 473 U.S. at 247; *see also Pennhurst I*, 451 U.S. at 17 ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."). As noted above, *Alden* and *College Savings Bank* instruct that States' assertions of sovereign immunity deserve the same deference as those of the federal government. Accordingly, it follows that the result in *Lane* – that the clear statement rule applicable to waivers of federal sovereign immunity is not satisfied where the suit is brought on an implied cause of action – applies equally in the context of the clear statement rule governing congressional invitations to the States to waive sovereign immunity by accepting federal funds.

Congress' enactment of 42 U.S.C. § 2000d-7(a)(1) does not change this analysis. That provision states that States "shall not be immune under the Eleventh Amendment . . . for violation of section 504." This prescription by no means *creates* a cause of action; rather, it *assumes* that a cause of action has been supplied elsewhere. Accordingly, this Court has characterized Section 2000d-7 as implicitly "ratif[ying]" or "validat[ing]" the judicially implied cause of action. *Alexander*, 532 U.S. at 279-80; *see also Barnes*,

122 S. Ct. at 2100 ("Congress has acknowledged" the existence of an implied right of action). Such an implicit ratification cannot satisfy the clear statement rule. A State reviewing the United States Code was not put on notice by Section 2000d-7(a)(1) that accepting federal money exposed it to suits for money damages under Section 504. At most, Section 2000d-7(a)(1) put the States on notice that they should look elsewhere for a cause of action. But a search of the United States Code for a statute creating a cause of action for violations of Section 504 would be fruitless, for Section 2000d-7 itself indisputably does not create such a cause of action, nor does any other enactment by the Congress.

Indeed, in the same opinion in which it characterized Section 2000d-7 as "ratif[ying]" or "validat[ing]" the implied cause of action for violations of Title VI claims, the Court acknowledged, but did not resolve, the question whether "implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear statement rule of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1 (1981)." *Alexander*, 532 U.S. at 293 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656-57, 684-85 (1999) (Kennedy, J., dissenting)). The Court should now take up and resolve this important question. It has instructed in *Pennhurst I*, *Lane*, *Alden*, and *College Savings Bank* that a clear statement by Congress is a prerequisite to a State waiving its sovereign immunity through the acceptance of federal funds; and it has held that a statute's ambiguity defeats any such waiver. It follows *a fortiori* that the failure of Congress to make *any* statutory statement regarding the availability of a private cause of action cannot give rise to a valid waiver of a State's sovereign immunity from private suits for money damages.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the petition for a writ of certiorari be granted.

October 4, 2002

Respectfully submitted,

EARL I. ANZAI
Attorney General

DOROTHY SELLERS
CHARLES FELL
NANCY ALBANO
Deputy Attorneys General

425 Queen Street
Honolulu, HI 96813
(808) 589-1450

CHARLES J. COOPER*
MICHAEL W. KIRK
DEREK L. SHAFFER

COOPER & KIRK, PLLC
1500 K Street, N.W.,
Suite 200
Washington, DC 20005
(202) 220-9600

**Counsel of Record*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD K. LOVELL, *Plaintiff-Appellee,* v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, *Defendants-Appellants.*	Nos. 98-16545 99-15930 D.C. No. CV-97-01136-BMK
DOUGLAS D. DELMENDO, an incapacitated person, by his appointed guardian – Zosima Orillo Delmendo, *Plaintiff-Appellee,* v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, *Defendants-Appellants.*	Nos. 98-16548 99-15928 D.C. No. CV-97-00531-BMK OPINION

Appeal from the United States District Court
for the District of Hawaii
Barry M. Kurren, Magistrate, Presiding

Argued and Submitted
November 2, 1999 – Honolulu, Hawaii

Submission Withdrawn January 31, 2000
Resubmitted August 28, 2002

Filed September 5, 2002

Before: Dorothy W. Nelson, Alex Kozinski and William A. Fletcher, Circuit Judges.

Opinion by Judge William A. Fletcher

COUNSEL

Earl I. Anzai, Attorney General; Charles Fell, Senior Deputy Attorney General; Nancy Albano, Deputy Attorney General; Madeleine Austin, Deputy Attorney General, State of Hawaii, Honolulu, Hawaii, for the defendants-appellants.

Shelby Anne Floyd; Corianne W. Lau; Jason H. Kim, Alston Hunt Floyd & Ing, Honolulu, Hawaii, for the plaintiffs-appellees.

OPINION

W. FLETCHER, Circuit Judge:

In an underlying class action suit, part of which is still pending, the district court granted partial summary judgment for plaintiffs against the State of Hawaii ("the State") on the issues of unlawful discrimination and general liability for compensatory damages under Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794(a), based on the State's exclusion of certain

disabled people from its health insurance programs. *See Burns-Vidlak v. Chandler,* 939 F. Supp. 765, 773 (D. Haw. 1996). The class consists of disabled individuals who, but for their disabilities, were eligible for Hawaii's QUEST medical coverage. The district court certified this class retroactively for the purpose of determining general liability for compensatory damages and prospectively for the purpose of determining liability for punitive damages. It did not certify the class for purposes of determining the amount of compensatory damages in individual cases. Instead, the district court directed the individual class members to file individual suits for such determinations. Two of those individual suits, filed by Richard Lovell and Douglas Delmendo, have concluded after bench trials with awards of compensatory damages and are the subject of the current consolidated appeal.

The State – though questioning our jurisdiction to hear this appeal due to the lack of a final judgment in the ongoing class action with respect to punitive damages – appeals the underlying determination of unlawful discrimination, the underlying conclusion that the class plaintiffs are entitled to compensatory damages, and the award of litigation expenses to Lovell and Delmendo. We hold that we have jurisdiction to hear this appeal under 28 U.S.C. § 1291, and we affirm on the merits.

I. Hawaii's Health Insurance Programs

Prior to August 1, 1994, the State of Hawaii provided medical benefits to some of its most financially needy residents through a fee-for-service ("FFS") Medicaid program. Medicaid served the aged, blind, and disabled ("ABD") population, those receiving Aid to Families with

Dependent Children ("AFDC"), and those receiving general assistance ("GA") benefits. Membership in these groups alone did not, however, automatically lead to benefits eligibility. In order to receive Medicaid benefits, group members also had to have an income no greater than 100% of the federal poverty level and assets not in excess of $2,000.

In recognition of the fact that these income and asset tests left uninsured a sizable group of the poor, including the working poor, the State extended medical and dental benefits to a "gap group" whose income was no greater than 300% of the federal poverty level through the State Health Insurance Program ("SHIP"), a limited FFS program. SHIP did not contain an asset test. Some participants in SHIP were aged, blind, or disabled residents who could not meet the more stringent income and asset requirements of the State's Medicaid program.

On August 1, 1994, the State launched a new program, QUEST, to begin transforming its FFS programs into a more cost-effective HMO-based plan. Recipients of GA and AFDC, as well as SHIP participants, were eligible to receive benefits under QUEST if their income was no more than 300% of the federal poverty level, unless they were aged, blind, or disabled. The ABD population was categorically excluded from QUEST on the basis of age, blindness, or disability:

> *Categorical requirements.* Persons who are ineligible to participate in Hawaii Health QUEST include the following groups of individuals.
>
> (1) Persons who are age sixty-five or older.

> (2) Persons who are blind or disabled according to the criteria employed by the Social Security Administration.

Haw. Admin. R. § 17-1727-13 (1994). The State eliminated its prior FFS programs, except for ABD individuals who qualified under the old FFS Medicaid criteria. As a result, ABD persons who met the Medicaid income and asset tests retained their benefits under the old FFS system, but several hundred blind and disabled members of the SHIP population were denied any coverage under QUEST.

According to its brief, the State excluded ABD persons from QUEST "because the lack of actuarial data and anticipated high costs due to their special needs produced lack of predictability, which would result in health care insurers refusing to participate in QUEST." The State asserts that it would have been unable to implement the program without such providers. The State claims that it planned to allow the ABD to receive benefits under QUEST at some later date, after it had demonstrated the success of the initial program.

On March 30, 1996, the State amended its QUEST program. Although the State retained QUEST's exclusion of all ABD people, it imposed the same asset test as the Medicaid FFS program for all participants, thereby excluding non-ABD former SHIP members from participation in QUEST as well. *See* Haw. Admin. R. § 17-1727-14 (as amended Mar. 30, 1996).[1]

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[1] The eligibility criteria for QUEST were amended again in December 1997 to reduce the income limit for most individuals to 100% (from 300%) of federal poverty level (still excluding the ABD population), thereby placing the entire "gap group" outside QUEST. *See* Haw.

(Continued on following page)

The question of whether QUEST, as amended, complies with federal law is not before us.[2] Lovell and Delmendo base their claims on the QUEST program as it existed from August 1, 1994 to March 30, 1996.

II. Procedural History

A. Class Action

On November 2, 1995, Shea Burns-Vidlak, a disabled minor, and George Cohn, a blind adult, filed a complaint in federal district court against Susan Chandler, the Director of the Hawaii Department of Human Services, and, upon later amendment, against the State of Hawaii. The plaintiffs alleged that they would have been eligible for benefits under QUEST but for their disabilities, and that QUEST's categorical exclusion of persons with disabilities violated Title II of the ADA and Section 504 of the RA. On February 14, 1996, the plaintiffs filed a motion for partial summary judgment.

The State raised several defenses in opposition. First, the State argued that the plaintiffs were not discriminated against solely by reason of disability, but rather on the basis of financial criteria plus their disability. Second, the

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Admin. R. § 17-1727-14 (as amended Dec. 27, 1997). Though amended several times since, the current regulation maintains these basic criteria.

[2] The district court in *Burns-Vidlak* only addressed the State's liability for the period from August 1, 1994 to March 30, 1996, dismissing as moot at that time the plaintiffs' claim for injunctive relief given the amendment to QUEST and given a new provision of limited coverage for ABD people with greater assets. *See Burns-Vidlak*, 939 F. Supp. at 766-67.

State claimed that the United States Health Care Financing Administration ("HCFA"), an agency within the Department of Health and Human Services ("DHHS"), granted the State a waiver from compliance with the ADA and the RA on the ground that QUEST was an experimental program. Third, the State argued that QUEST's exclusion of disabled persons was permissible under ADA and RA regulations because the exclusion was "necessary" to ensure the financial viability of the program.

On April 12, 1996, the district court rejected the State's defenses and granted the plaintiffs partial summary judgment, concluding that the State had violated the ADA and the RA between August 1, 1994 and March 30, 1996 because of its facial, categorical exclusion of all otherwise-qualified disabled persons from QUEST. *See Burns-Vidlak,* 939 F. Supp. at 773. The district court held that the plaintiffs were generally entitled to recover compensatory damages, but did not address the issue of the specific amount of compensatory damages for particular individuals. On May 15, 1996, plaintiffs filed an amended complaint requesting punitive damages.

Prior to the April ruling, on March 4, 1996, the plaintiffs had filed a motion for class certification. On June 27, 1996, after the district court had granted plaintiffs summary judgment on the question of liability for compensatory damages, and after plaintiffs had amended their complaint to seek punitive damages, the court partially granted plaintiffs' motion for class certification. *Burns-Vidlak,* No. 95-00892 ACK, Order Granting in Part and Denying in Part Plaintiffs' Motion for Class Certification (D. Haw. filed June 27, 1996) (unpub. order). The court held that class treatment was appropriate for the already decided question of general liability for compensatory

damages, and for the undecided question of the State's liability for punitive damages. *Id.* at 8. However, the court directed the individual class members to file separate actions for particularized determinations of the amount of compensatory damages the State owed them. *Id.* at 9.

On December 19, 1997, on the State's motion, the district court issued an order clarifying its April 12, 1996 order with respect to compensatory damages. *Burns-Vidlak,* No. 95-00892 ACK, Order of Clarification Regarding Compensatory Damages (D. Haw. filed Dec. 19, 1997) (unpub. order). The district court explained that it had found that the State had engaged in "intentional discrimination" warranting the imposition of compensatory damages. *Id.* at 3. "[T]he State, despite its good faith efforts, deliberately intended to discriminate against and to deprive all blind and disabled individuals from their federally protected rights under the ADA and the RA during the subject transition period, although such transition period would ultimately lead to equal benefits." *Id.* at 4. The court also found that "the scope of compensatory damages encompasses both general and special damages," to be individually assessed in the separate actions filed by individual class members. *Id.* at 7.

B. Appellees' Individual Actions

More than 300 class members filed individual actions for compensatory damages in the Hawaii district court. With the parties' consent, the QUEST-related cases were transferred to Magistrate Judge Barry M. Kurren on February 25, 1998.

On July 20 and 22, 1998, Lovell and Delmendo were awarded $10,192.22 and $1,053.21, respectively, at the

conclusion of separate bench trials. The trial court also awarded each of them reimbursement for attorneys' fees, costs (including expert witness fees), and prejudgment interest. In addition, the trial court certified that its ruling constituted a final judgment pursuant to Federal Rule of Civil Procedure 54(b), based on a finding that there was no just reason for delay. The State's appeal from these two individual judgments is now before us.

III. Appellate Jurisdiction

We address our appellate jurisdiction before we address the merits. *See Williamson v. UNUM Life Ins. Co. of Am.*, 160 F.3d 1247, 1250 (9th Cir. 1998). The State contends that it has filed the instant appeals "in an abundance of caution," and argues that this court does not have appellate jurisdiction under 28 U.S.C. § 1291. Section 1291 grants this court jurisdiction over "final decisions" of the district courts. A decision is normally final and appealable under 28 U.S.C. § 1291 only if it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). Pursuant to Federal Rule of Civil Procedure 54(b), a district court "may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties" if it expressly determines that there is no just reason for delay. The State questions the finality of the judgments before us because the issue of punitive damages in the underlying *Burns-Vidlak* class action remains unresolved, and because Lovell and Delmendo's requests for equitable relief in their individual complaints have never been adjudicated.

The State relies chiefly on *Arizona State Carpenters Pension Trust Fund v. Miller,* 938 F.2d 1038 (9th Cir. 1991), for its argument that the ongoing litigation of punitive damages in the continuing *Burns-Vidlak* class action prevents us from exercising appellate jurisdiction. In *Miller,* the district court dismissed a punitive damages count in a case alleging breach of fiduciary duty under ERISA, and it certified its dismissal of that count of the complaint as appealable pursuant to Rule 54(b). We concluded that this court did not have jurisdiction to hear the appeal despite the Rule 54(b) certification, noting that "the count for punitive damages is not 'separate and distinct' from the remainder of the counts in the complaint, but is based on a single set of facts giving rise to a legal right of recovery under several different remedies." *Id.* at 1040 (quoting *Denholm v. Houghton Mifflin Co.,* 912 F.2d 357, 360 (9th Cir. 1990)). The punitive damages count and the compensatory damages count were "inextricably intertwined." *Id.* (internal quotation marks omitted). Accordingly, we held that the punitive damages count was not a separate claim, and that judgment on the claim was not final. *Id.* The State argues that because there is an unresolved punitive damages claim in the pending class action, the judgments for compensatory damages in the individual actions are not final and cannot be reviewed under *Miller.*

The State's position fails to account for the unique procedural posture of the instant appeals. Unlike the appeal in *Miller,* these appeals arise from individual lawsuits in which Lovell and Delmendo sought only compensatory, not punitive, damages. Neither side disputes that there was no claim for punitive damages in their individual suits, and that the punitive damages

claim will be litigated by the class representatives in the separate *Burns-Vidlak* class action case. Indeed, because there was no claim for punitive damages in the individual suits, the trial court in *Lovell* correctly determined that there was not even any need for Rule 54(b) certification, which is only applicable if there are multiple claims. It wrote:

> This court does not believe [Rule 54(b)] certification is required. The *Burns-Vidlak* class was certified for purposes of liability for compensatory and punitive damages and for a determination of the proper amount of punitive damages. Issues related to punitive damages for the *Burns-Vidlak* class are on appeal to the Ninth Circuit. This court believes that all issues in connection with punitive damages, including Plaintiff's entitlement to a specific award, remain pending in the *Burns-Vidlak* action and do not prevent this order from being a final ruling in the instant case.

Because the claims for compensatory damages and punitive damages arise in separate cases, they are not "inextricably intertwined" as they were in *Miller*.[3] We therefore deem the trial court's award of compensatory damages to be a final decision.

That we will need, in effect, to review the merits of the partial grant of summary judgment in *Burns-Vidlak* in order to decide the current appeals does not alter our

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[3] We also note that the Supreme Court recently held that punitive damages are not available in a private cause of action brought under § 202 of the ADA and § 504 of the RA. *See Barnes v. Gorman*, 122 S. Ct. 2097, 2103 (2002).

conclusion. The current appeals arise from two separate individual actions that have concluded.[4] The fact that the decisions in these separate actions incorporated by reference the reasoning and result of the *Burns-Vidlak* partial summary judgment does not make their judgments any less final. The court could easily have repeated the reasoning, and have reached the same result, without expressly citing the *Burns-Vidlak* order; we fail to see why this should affect the appealability of the result. Further, "[a]n appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment." *Litchfield v. Spielberg,* 736 F.2d 1352, 1355 (9th Cir. 1984). The grant of partial summary judgment in *Burns-Vidlak* could be viewed as such an order. Review of the substance of that order is "necessary to ensure meaningful review" of the *Lovell* and *Delmendo* judgments. *Clinton v. Jones,* 520 U.S. 681, 707 n.41 (quoting *Swint v. Chambers Cty. Comm'n,* 514 U.S. 35, 51 (1995)).

From a practical standpoint, denying appellate jurisdiction in these cases would needlessly interfere with efficient judicial administration. There are over 300 pending individual compensatory damages actions arising from the *Burns-Vidlak* class action. To withhold appellate review until a continuing class action, in which the only remaining issue is punitive damages, becomes final would

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[4] The lower court refused to certify the compensatory damage award of the named plaintiff in the *Burns-Vidlak* action as a final judgment under Rule 54(b) due to the ongoing claim for punitive damages in the same case. *See Burns-Vidlak,* No. 95-00892 BMK, Order Denying Defendants' Motion for Entry of Final Judgment as to Individual Claims of Plaintiff Shea Burns-Vidlak and Rule 54(b) Certification (D. Haw. filed July 30, 1999).

create unnecessary delay and uncertainty for the individual actions and would not further judicial economy in the class action. *See, e.g., Williamson,* 160 F.3d at 1250-51 (stating that special circumstances could warrant a conclusion of practical finality in regard to a partial summary judgment order); *French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 784 F.2d 902, 905 n.3 (9th Cir. 1986) (finding that "no practical benefits would accrue from a dismissal for lack of appellate jurisdiction"). This court will inevitably, at some point, review the underlying liability determination; now that the issue is before us, given the completion of Lovell and Delmendo's individual suits, there is no reason to wait any longer to make that determination. We thus hold that the pendency of the class action with respect to punitive damages does not deprive us of jurisdiction to hear these appeals.

The State also argues that the individual actions now before us have not yet become final because the trial court never ruled upon Lovell and Delmendo's additional claims for injunctive or declaratory relief. Lovell and Delmendo respond that they abandoned these claims before trial, as evidenced by the absence of the claims from the pre-trial statements, the lack of any subsequent proceedings or motions in relation to the claims, and the court's apparent belief that it was adjudicating all of the issues still before it when it issued its judgments.

Abandoned claims do not compromise the finality of the judgment if it is clear that the trial court intended to dispose of all the claims before it. *See Spitz v. Tepfer,* 171 F.3d 443, 447-48 (7th Cir. 1999); *Chiari v. City of League City,* 920 F.2d 311, 314 (5th Cir. 1991); *see also Alaska v. Andrus,* 591 F.2d 537, 540 (9th Cir. 1979) (using a "common sense" approach to finality requirement to infer the

rejection of a claim). The post-complaint filings in Lovell and Delmendo's individual cases support the conclusion that they indeed abandoned their claims for equitable relief, and the court below did not believe any additional claims for relief were still pending when it entered its judgment. In its written orders in *Lovell* and *Delmendo,* the trial court described the actions as "individual action[s] seeking general and special damages and prejudgment interest." Further, the fact that the court did not believe Rule 54(b) certification to be necessary supports the inference that it did not consider any claims to be outstanding. We therefore hold that Lovell and Delmendo's initial requests for equitable relief in their individual complaints were abandoned, and that those requests do not deprive us of appellate jurisdiction over the court's final rulings on compensatory damages.

IV. Eleventh Amendment Immunity

The State asserts sovereign immunity under the Eleventh Amendment against Lovell and Delmendo's claims under Title II of the ADA and § 504 of the RA. Whether a state has immunity under the Eleventh Amendment presents questions of law reviewed de novo. *See Demshki v. Monteith,* 255 F.3d 986, 988 (9th Cir. 2001).

States are protected in various ways by the Eleventh Amendment, or, to state it more accurately, by the sovereign immunity principle for which the Amendment has come to stand. *See, e.g., Alden v. Maine,* 527 U.S. 706, 713 (1999) (stating that the phrase "Eleventh Amendment immunity" is a "convenient shorthand but something of a misnomer"); *Hans v. Louisiana,* 134 U.S. 1, 15 (1890) ("The letter [of the Amendment] is appealed to now . . . as a

ground for sustaining a suit brought by an individual against a State. . . . It is an attempt to strain the Constitution and the law to a construction never imagined or dreamed of."). Two exceptions to the State's sovereign immunity are relevant in this case. First, Congress may abrogate the State's sovereign immunity by acting pursuant to a grant of constitutional authority under Section Five of the Fourteenth Amendment. *See Kimel v. Fla. Bd. of Regents,* 528 U.S. 62, 80 (2000). Second, a state may waive its Eleventh Amendment defense. *See Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 670 (1999).

The State argues that neither exception applies here. It relies upon the Supreme Court's decision in *Board of Trustees of the University of Alabama v. Garrett,* 531 U.S. 356 (2001), to argue that Congress did not validly abrogate the State's immunity against suit because Title II of the ADA and § 504 of the RA exceed Congress' remedial power under Section Five of the Fourteenth Amendment. Before *Garrett,* we had held that Congress acted within the scope of its Fourteenth Amendment enforcement powers, and validly abrogated Eleventh Amendment immunity, in passing Title II of the ADA and § 504 of the RA. *See Clark v. State of California,* 123 F.3d 1267, 1270-71 (9th Cir. 1997); *Dare v. State of California,* 191 F.3d 1167, 1173-75 (9th Cir. 1999) (discussing the ADA only). In *Garrett,* the Supreme Court held that Congress acted outside the scope of its Section Five powers in enacting Title I (dealing with employment discrimination) of the ADA. *See Garrett,* 531 U.S. at 368-69. But the Court expressly reserved the question of whether Title II (dealing with "services, programs, or activities of a public entity") of the ADA is appropriate legislation under Section Five. *Id.* at 360 n.1.

In light of that reservation, we recently held in *Hason v. Medical Board of California,* 279 F.3d 1167 (9th Cir. 2002), that *Clark* and *Dare* are still good law as to Title *II* of the ADA, and that the Eleventh Amendment does not bar claims against the State brought under Title *II* of the ADA. Thus, we reject the State's argument as to Title II of the ADA.[5]

The State also argues that its acceptance of federal RA funds did not constitute a valid waiver of its Eleventh Amendment immunity as to claims under § 504 of the RA. But our decision in *Douglas v. California Department of Youth Authority,* 271 F.3d 812 (9th Cir. 2001), forecloses that argument. In *Douglas,* decided after *Garrett,* we reaffirmed *Clark*'s alternative holding that Congress validly conditioned a state's receipt of RA funding on its consent to waive its Eleventh Amendment immunity from suit under § 504 of the RA.[6] *See id.* at 820-21; *see also*

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[5] The holding in *Clark* that Congress, acting pursuant to its powers under Section Five of the Fourteenth Amendment, abrogated the state's Eleventh Amendment immunity in enacting the Rehabilitation Act has not yet been reaffirmed after *Garrett*'s holding with respect to Title I of the ADA. But given the fact that Title II of the ADA and § 504 of the RA are nearly identical, both in content and remedial provisions, *see infra* Part V, our holding in *Hason* would likely apply to claims brought against states under § 504 of the RA as well. Nevertheless, because we conclude that the State waived its sovereign immunity by accepting RA funds, *see infra,* we need not reach the question whether Congress validly abrogated the states' sovereign immunity under the RA. *See Douglas v. Cal. Dep't of Youth Auth.,* 271 F.3d 812, 819-20 (9th Cir. 2001) (making the same observation).

[6] The amended Rehabilitation Act provides, "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." 42 U.S.C. § 2000d-7.

Vinson v. Thomas, 288 F.3d 1145, 1151 (9th Cir. 2002). It is uncontested that the State accepted federal RA funds.

Finally, we reject the State's argument that Congress exceeded its Spending Clause powers and the conditions set forth in *South Dakota v. Dole,* 483 U.S. 203 (1987), when it conditioned the receipt of RA funds on a waiver of sovereign immunity. The Act's tying arrangement does not violate *Dole*'s "relatedness" requirement and is not unduly coercive. Congress has a strong interest in ensuring that federal funds are not used in a discriminatory manner and in holding states responsible when they violate funding conditions. The term "program or activity" in section 504, moreover, does not encompass all the activities of the State. Instead, it only covers all the activities of the department or the agency receiving federal funds. *See* 29 U.S.C. § 794(b)(1)(A); *Jim C. v. United States,* 235 F.3d 1079, 1082 (8th Cir. 2000) (en banc). If a state does not wish to relinquish immunity, it could follow the "simple expedient of not yielding." *Oklahoma v. U.S. Civil Serv. Comm'n,* 330 U.S. 127, 143-44 (1947) (internal quotation marks omitted). There is no showing of the type of "extraordinary circumstances," *California v. United States,* 104 F.3d 1086, 1092 (9th Cir. 1997), required by our case law that would allow us to hold that Congress has exceeded constitutional boundaries.

We therefore agree with our sister circuit, *see Jim C.,* 235 F.3d at 1081-82, that the Rehabilitation Act is a valid exercise of Congress's spending power. The Eleventh Amendment is thus not a bar to Lovell and Delmendo's § 504 claims against the State. *See Vinson,* 288 F.3d at 1151; *Douglas,* 271 F.3d at 820-21.

Because we hold that the Eleventh Amendment does not bar Lovell and Delmendo's suits under Title II of the ADA or § 504 of the RA, we need not reach their arguments that the State waived its sovereign immunity by failing to assert the Eleventh Amendment defense until late in the litigation. We turn now to the merits of plaintiffs' claims.

V. Unlawful Discrimination under the ADA and the RA

The district court granted summary judgment to the *Burns-Vidlak* class on the question of unlawful discrimination under Title II of the ADA and § 504 of the RA, concluding that the plaintiffs had established an unrebutted prima facie case of violations by the State in excluding otherwise qualified disabled persons from the QUEST program on the basis of their disabilities. *See Burns-Vidlak,* 939 F. Supp. at 771-73. The trial court in *Lovell* and *Delmendo* expressly relied on that holding in awarding compensatory damages in the individual actions. The State now challenges the holding that it engaged in unlawful discrimination. We review the grant of summary judgment de novo, using the same standard as the district court. FED. R. CIV. P. 56(c); *Robi v. Reed,* 173 F.3d 736, 739 (9th Cir. 1999).

Title II of the ADA and § 504 of the RA both prohibit discrimination on the basis of disability. The ADA applies only to public entities, whereas the RA proscribes discrimination in all federally-funded programs. Title II of the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by

> reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132. Similarly, the RA provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . . .

29 U.S.C. § 794(a).

To establish a violation of Title II of the ADA, a plaintiff must show that (1) she is a qualified individual with a disability; (2) she was excluded from participation in or otherwise discriminated against with regard to a public entity's services, programs, or activities, and (3) such exclusion or discrimination was by reason of her disability. *See Weinreich v. Los Angeles County Metro. Transp. Auth.,* 114 F.3d 976, 978 (9th Cir. 1997). To establish a violation of § 504 of the RA, a plaintiff must show that (1) she is handicapped within the meaning of the RA; (2) she is otherwise qualified for the benefit or services sought; (3) she was denied the benefit or services solely by reason of her handicap; and (4) the program providing the benefit or services receives federal financial assistance. *See id.*

The district court found that there was no material dispute of fact with respect to any of these elements. *See Burns-Vidlak,* 939 F. Supp. at 771. We agree. Since Lovell and Delmendo were part of the certified class – those

otherwise eligible for QUEST but denied benefits because of their disabilities – we hold that they established prima facie cases of violations of both Title II of the ADA and § 504 of the RA.

The district court in *Burns-Vidlak* then considered and rejected on the merits three defenses asserted by the State: (1) that plaintiffs were not discriminated against "solely" because of their disabilities but rather on the basis of financial criteria plus their disabilities; (2) that the State's waiver from the HCFA for the QUEST program implicitly exempted it from the anti-discrimination provisions of the RA and the ADA; and (3) that the "necessity" exception outlined in the Code of Federal Regulations absolved the State of liability. *Id.* at 771-73. The State now asserts a series of defenses to the determinations of unlawful discrimination, some repeated and some new.[7] We consider each of them in turn.[8] Because we find that all of the State's arguments ultimately fail on the merits, we need not reach the issue of whether any of the new

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[7] In its pre-trial statement in the *Lovell* proceedings, the State had asked the trial court to issue an order determining whether it would be able to contest the finding of unlawful discrimination under the ADA and RA by the district court on partial summary judgment in the *Burns-Vidlak* action. No such order was ever issued, but the trial court relied on and thereby incorporated the *Burns-Vidlak* finding of unlawful discrimination.

[8] The State does not raise the penultimate argument in its briefing for these appeals, but did so in its briefing for *Hirata v. Chandler,* No. 99-15554, and *Ho v. Chandler,* No. 99-15670, closely related cases arising from the same *Burns-Vidlak* class action. We heard oral argument in all of these cases on the same day, and memorandum dispositions in *Hirata* and *Ho* are being filed contemporaneously with this opinion. Therefore, for the sake of completeness and simplicity, we treat all of the State's defenses in this opinion.

arguments were waived due to the State's failure to raise them in the earlier *Burns-Vidlak* district court proceeding.

A. Whether Viewing Hawaii's Medicaid Program as a Whole Alters the Conclusion that the State Categorically Discriminated Against the Disabled

The State argues, in reliance on 28 C.F.R. § 35.150(a), that a public entity need only operate its programs in such a manner that, when viewed as a whole, they are readily accessible and usable by people with disabilities. The State argues that the district court in *Burns-Vidlak* (and by incorporation, the court in *Lovell* and *Delmendo*) improperly failed to consider its system of healthcare coverage in its entirety and instead wrongly focused solely on the QUEST program. Specifically, the State argues that those disabled people able to qualify financially for the FFS/ABD program received Medicaid benefits. Therefore, according to the State, only those disabled persons unable to qualify financially for the continuing FFS/ABD program were excluded from Medicaid benefits, and it follows that the true disqualifying criterion was the restrictive income and assets test of the FFS/ABD program rather than the statutory exclusion of the disabled from QUEST.

The State's argument misses the point of plaintiffs' suit. Plaintiffs complain that they were discriminatorily denied benefits in the QUEST program. It is undisputed that disabled people who, but for their disability, were eligible for healthcare benefits from the State under QUEST but could not qualify for the FFS program were denied coverage because of the categorical exclusion of the disabled from QUEST. When viewed in relation to similarly situated nondisabled individuals, those disabled

persons were denied QUEST coverage by the State solely because of their disabilities; that is, had they been nondisabled, they would have received QUEST coverage. And it is precisely those disabled people, like Lovell and Delmendo, who comprise the class plaintiffs in *Burns-Vidlak*.

B. Whether the Disabled Had Meaningful Access to Public Benefits After the State Implemented the QUEST Program

Along similar lines, the State also argues that the continued availability of the FFS/ABD program after QUEST was implemented means that it did not deny the disabled "meaningful access" to public benefits. Lovell and Delmendo dispute the use of a "meaningful access" standard in this case. Assuming without deciding that "meaningful access" is the appropriate standard, we find that the State's provision of healthcare benefits violates § 504 of the RA and Title II of the ADA.

According to the State, "the fee for services [FFS] delivery system in which the disabled remained afforded them not only an equal opportunity to obtain quality medical care, but also an opportunity to obtain superior medical care because of the greater choice of physicians available." In making this argument, the State again fails to acknowledge the plight of disabled people such as Lovell, Delmendo, and other members of the *Burns-Vidlak* class: they qualified financially for the QUEST program but were excluded because they were disabled, and they were excluded from participation in the FFS program because they could not qualify financially. That is, the "fees for services [FFS] delivery system in which the disabled remained" was not a system in which Lovell and Delmendo could participate. Some disabled people

remained in the FFS program, but Lovell, Delmendo, and similarly situated people did not. The State's appropriate treatment of some disabled persons does not permit it to discriminate against other disabled people under any definition of "meaningful access."

C. Whether The State Was Relieved of the Duty to Include the Disabled in QUEST Because Such Inclusion Would Have "Fundamentally Altered" the QUEST Program

In *Crowder v. Kitagawa,* 81 F.3d 1480 (9th Cir. 1996), we explained that

> [w]hen a state's policies, practices or procedures discriminate against the disabled in violation of the ADA, Department of Justice regulations require reasonable modifications in such policies, practices or procedures "when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would *fundamentally alter* the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7).

Id. at 1485 (emphasis added). The State asserts that there is a material issue of fact as to whether including the disabled in QUEST would have been a reasonable modification or whether such inclusion would have fundamentally altered its program. The State contends that summary judgment on the question of unlawful discrimination was therefore improper.

However, we have held that the fundamental alteration test has no application to cases of facial discrimination, expressly limiting *Crowder's* application of § 35.130(b)(7) to cases of disparate impact discrimination. *See Bay Area*

Addiction Research & Treatment, Inc. v. City of Antioch ("BAART"), 179 F.3d 725, 734-35 (9th Cir. 1999); *see also MX Group, Inc. v. City of Covington,* 293 F.3d 326, 345 (6th Cir. 2002). In *BAART,* we reasoned that "[t]he only possible modification of a facially discriminatory law that would avoid discrimination on the basis of disability would be the actual removal of the portion of the law that discriminates on the basis of disability. However, such a modification would fundamentally alter the ordinance." *BAART,* 179 F.3d at 734. Public entities could evade the ADA by claiming it would fundamentally alter their program to eliminate a facially discriminatory provision of a challenged program, and Congress' intent in enacting the ADA would be defeated. *Id.* Because the QUEST program facially discriminates against the disabled, we reject the State's "fundamental alteration" defense, as we did in *BAART.*

D. Whether It Was "Necessary" to Exclude the Disabled from Participation in QUEST

The State argues that there was a material issue of fact, sufficient to preclude summary judgment, on whether QUEST's exclusion of otherwise eligible disabled persons and the use of two different delivery systems (FFS/ABD and QUEST) were "necessary" to ensure the financial viability of the State's health care program. Under the implementing regulations, a public entity may provide different or separate benefits under section 504 and Title II if "such action is necessary to provide qualified individuals with disabilities with aids, benefits, or services that are *as effective as those provided to others.*" 28 C.F.R. § 35.130(b)(1)(iv); 28 C.F.R. § 41.51(b)(1)(iv) (emphasis added). Although the State might have believed that it was financially necessary to exclude the disabled from

QUEST, the plain language of the regulations prohibits a state from doing so unless it provides them with benefits "as effective as those provided to others." For Lovell, Delmendo, and those similarly situated, the "different or separate" benefit the State provided was no benefit at all. We thus agree with the district court in *Burns-Vidlak* that the State cannot avoid liability under the "necessity" exception.

E. Whether The Supreme Court Has Held That the ADA Does Not Apply to Experimental Programs

The State relies on a passage from the Supreme Court's decision in *Albertson's, Inc. v. Kirkingburg,* 527 U.S. 555 (1999), to argue that Congress did not intend the ADA to apply to experimental Medicaid programs such as QUEST. In *Albertson's,* the Court upheld an employer's right to refuse to employ an ADA plaintiff for his failure to meet a generally applicable federal minimum vision regulation, despite the fact that the plaintiff had obtained permission to participate in an experimental federal vision-safety program that would not have disqualified him for his poor vision. The Court explained:

> The waiver program [in which the plaintiff would participate] was simply an experiment with safety, however well intended, resting on a hypothesis whose confirmation or refutation in practice would provide a factual basis for considering the existing standards. . . . It is simply not credible that Congress enacted the ADA (before there was any waiver program) with the understanding that employers choosing to respect the Government's sole substantive visual acuity regulation in the face of an experimental waiver

> might be burdened with an obligation to defend the regulation's application according to its own terms.

Id. at 576-78 (footnote omitted).

This passage from *Albertson's* cannot support the broad proposition advanced by the State. We read *Albertson's* to say that it does not violate the ADA for a private employer to deny an individual an accommodation based on his participation in an experimental government program when that program does not substantively modify the generally applicable governing regulations. We do not, however, read it to say that experimental programs themselves need not comply with the ADA and RA. We thus reject the State's interpretation.

F. Whether the DHHS Implicitly Excused the State from Complying with the ADA and RA

In July 1993, the State received approval for its QUEST program from HCFA, part of DHHS. In conjunction with its approval, HCFA granted the State waivers under 42 U.S.C. § 1315 of certain statutory requirements mandated by 42 U.S.C. § 1396a for "State plans for medical assistance." The State's proposal revealed the fact that QUEST would not cover the ABD population, but it also indicated that the State would comply with the ADA and the RA. *See Burns-Vidlak,* 939 F. Supp. at 767 & n.3. The State contends, as it did before the district court in the *Burns-Vidlak* action, that the HCFA waivers for QUEST implicitly excused it from complying with the ADA and the RA.

We disagree. The HCFA waivers upon which the State relies neither could have exempted QUEST from the ADA

and the RA, nor purported to do so. Section 1315 authorizes the DHHS to waive various provisions of the Medicaid statute, but it does not mention the ADA or the RA. *See also* 28 C.F.R. § 35.190(b)(3) (charging the DHHS with implementing Title II compliance procedures for programs relating to the provision of health care and social services). Further, even if DHHS did have the authority to waive the ADA and the RA, the State's request to DHHS represented that it would comply with the ADA and the RA. Such a representation can hardly be mistaken for a request for waiver.

VI. Compensatory Damages

The State urges that, even if it did violate the ADA and the RA, there remains a material dispute of fact regarding Lovell and Delmendo's entitlement to compensatory damages. The State argues that, despite its facial exclusion of the disabled from QUEST, it did not "intentionally discriminate" because it acted with "good faith" intentions. We nevertheless affirm the determination that Lovell and Delmendo are entitled to compensatory damages as a matter of law.

The same remedies are available for violations of Title II of the ADA and § 504 of the RA. *See* 42 U.S.C. § 12133. The remedies, in turn, are the same as those set forth in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. *See* 29 U.S.C. § 794a(a)(2); *Ferguson v. City of Phoenix,* 157 F.3d 668, 674 (9th Cir. 1998). In accord with Title VI case law, *see Guardians Ass'n v. Civil Serv. Comm'n,* 463 U.S. 582 (1983), "compensatory damages are not available under Title II or § 504 absent a showing of discriminatory intent." *Ferguson,* 157 F.3d at 674; *see also*

Memmer v. Marin Cty. Courts, 169 F.3d 630, 633 (9th Cir. 1999).

In *Duvall v. County of Kitsap,* 260 F.3d 1124 (9th Cir. 2001), we recently described with some precision the level of intent required to support an award of compensatory damages. In that case, a hearing-impaired litigant sued state court and county personnel under Title II of the ADA and § 504 of the RA for their failure to provide special accommodation in the form of real-time transcription for his hearings. *Id.* at 1129. We held that the "deliberate indifference" standard applies. *Id.* at 1138. "Deliberate indifference requires both knowledge that a harm to a federally protected right is substantially likely, and a failure to act upon that likelihood." *Id.* at 1139 (citing *City of Canton v. Harris,* 489 U.S. 378, 389 (1988)). The first element is satisfied when the public entity has notice that an accommodation is required. *Id.* The second element is satisfied if the entity's "failure to act [is] a result of conduct that is more than negligent, and involves an element of deliberateness." *Id.* Under the second element, "a public entity does not 'act' by proffering just any accommodation: it must consider the particular individual's need when conducting its investigation into what accommodations are reasonable." *Id.* (footnote omitted).

In *Duvall* and the line of cases on which it relies, the public entities had allegedly failed to provide special accommodations to a disabled person or had sustained policies that allegedly had a disparate impact on the disabled. *See Memmer,* 169 F.3d at 633-34 (allegation that a municipal court violated a blind litigant's ADA right by failing to provide special assistance during pre-trial preparation and during the trial itself); *Ferguson,* 157 F.3d

at 670 (allegation that city's operation of its 9-1-1 emergency service had discriminatory impact on the hearing-impaired under Title II and § 504); *see also Guardians,* 463 U.S. at 598 (finding, in a suit based on the city police department's "last-hired, first-fired" policy, that discrimination "resulted from the *disproportionate impact* of the entry-level tests on racial minorities" but that "proof of *discriminatory impact* does not end the matter") (emphasis added). In contrast, this case involves *facial discrimination,* in the form of a categorical exclusion of disabled persons from a public program. In such a case, the public entity is, at the very least, "deliberately indifferent"; by its very terms, facial discrimination is "intentional." *See Pandazides v. Va. Bd. of Ed.,* 13 F.3d 823, 830 n.9 (4th Cir. 1994) (reasoning that because "intentional discrimination" was "synonymous with discrimination resulting in 'disparate treatment,' which contrasts with disparate impact," no greater proof of mental state was necessary) (citing *Guardians,* 463 U.S. at 584 n.2 (opinion of White, J.)).

Applying the *Duvall* standard in this context, we find that the State acted with "deliberate indifference," and therefore engaged in "intentional discrimination." First, when a state facially discriminates against the disabled, it is chargeable with notice that federal rights are implicated by such discrimination. Thus, Hawaii had notice that a modification was required. Second, by choosing categorically to exclude disabled persons from QUEST, despite knowing that some of those excluded would remain without any coverage, the State has failed to act with the requisite care to protect the rights of the disabled.

Our finding of intentional discrimination in this case does not interfere with the purpose of the statutory limitation on compensatory damages. The Supreme Court has

said that the purpose of requiring proof of intent as a prerequisite for the recovery of monetary damages from a public entity is to ensure that the entity had knowledge and notice. The purpose is not to measure the degree of institutional ill will toward a protected group, or to weigh competing institutional motives. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287-89 (1998) (finding notice to the school district indispensable before it can be held financially liable under Title IX for a teacher's sexual harassment of a student, but not requiring active approval of such harassment); *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 74 (1992) ("The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award."); *Guardians,* 463 U.S. at 598 (explaining that monetary recovery under Title VI requires proof of intent so that the court can be sure that the recipient of the Title VI funds had knowledge of the violation and could have chosen to refuse the federal funds rather than face liability).

By categorically excluding all disabled persons from QUEST, the State had knowledge of its own facially discriminatory conduct and notice of the effects of its conduct on Lovell, Delmendo, and similarly situated disabled people. In so discriminating, and in failing to alleviate the impact of this discrimination on the disabled who remained without any coverage, the State acted with at least deliberate indifference. Accordingly, regardless of the State's asserted long-term motivations or competing interests, we conclude that the State's facial exclusion of the disabled from QUEST entitles Lovell and Delmendo to compensatory damages as a matter of law.

VII. Expert Witness Fees

The State concedes that Lovell and Delmendo are entitled to attorneys' fees, costs, and prejudgment interest if we affirm (as we do) the determinations of unlawful discrimination and the award of compensatory damages. However, the State objects to the trial court's decision to allow expert witness fees of more than $40 per day as part of its award of costs in both actions. In the State's view, reimbursement for expert fees should be limited to $40 pursuant to 28 U.S.C. §§ 1821(b) and 1920(3). Fee awards are reviewed for an abuse of discretion, although the choice of legal standard is a question of law reviewed de novo. *See Siegel v. Fed. Home Loan Mortgage Corp.*, 143 F.3d 525, 528 (9th Cir. 1998).

Absent "express statutory authority" for shifting expert witness fees, reimbursement for such fees is limited by §§ 1821(b) and 1920(3). *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987). The ADA authorizes a court to award attorneys' fees, litigation expenses, and costs to a prevailing party. *See* 42 U.S.C. § 12205; *see also* 28 C.F.R. § 35.175. The preamble to the ADA Title II regulations explains that "[l]itigation expenses include items such as expert witness fees, travel expenses, etc." 28 C.F.R. Pt. 35, App. A, Section-by-Section Analysis, § 35.175. This construction of the statute is consistent with its legislative history. According to committee reports, Congress included the term "litigation expenses" in order to authorize a court to shift costs such as expert witness fees, travel expenses, and the preparation of exhibits. *See* H.R. Rpt. No. 101-485 (III) at 73, *reprinted in* 1990 U.S.C.C.A.N. 445, 496 (Report of the Committee on the Judiciary) ("Litigation expenses include the costs of expert witnesses. This provision explicitly incorporates the

phrase 'including litigation expenses' to respond to rulings of the Supreme Court that items such as expert witness fees, travel expenses, etc., be explicitly included if intended to be covered under an attorney's fee provision."); H.R. Rpt. No. 101-485(II) at 140, *reprinted in* 1990 U.S.C.C.A.N. 303, 423 (Report of the Committee on Education and Labor) ("Litigation expenses include the costs of experts and the preparation of exhibits.").

The State argues that the term "litigation expenses" in 42 U.S.C. § 12205 is too vague to authorize the district court to shift expert fees to the prevailing party and that regulations do not amount to the sort of "express statutory authority" required by *Crawford.* We disagree. First, because the term "litigation expenses" normally encompasses expert witness fees, we hold that the statutory provision provides direct authority for the award of expert witness fees. Second, because Congress gave the Attorney General the authority to promulgate regulations under the ADA, 42 U.S.C. § 12134(a), those regulations "must be given legislative and hence controlling weight unless they are arbitrary, capricious, or clearly contrary to the statute." *Does 1-5 v. Chandler,* 83 F.3d 1150, 1153 (9th Cir. 1996) (quoting *United States v. Morton,* 467 U.S. 822, 834 (1984)). Therefore, even assuming that the term "litigation expenses" is too ambiguous to serve as "explicit statutory authority" for shifting expert witness fees, we must still defer to the interpretive regulations. The Attorney General's construction is not arbitrary, capricious, or contrary to the statute. We therefore affirm the trial court's awards of expert witness fees to Lovell and Delmendo.

Conclusion

For the foregoing reasons, we AFFIRM the judgments in *Lovell* and *Delmendo* in their entirety.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HELEN Y. HIRATA, Plaintiff-Appellee, v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, Defendants-Appellants.	No. 99-15554 D.C. No. CV-97-00503-BMK MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Barry M. Kurren, Magistrate, Presiding

Argued and Submitted November 2, 1999
Honolulu, Hawaii
Submission Withdrawn January 31, 2000
Resubmitted August 28, 2002

(Filed Sep. 5, 2002)

Before: D. W. NELSON, KOZINSKI and W. FLETCHER, Circuit Judges

The State of Hawaii appeals from the district court's judgment, following a jury trial, in favor of Helen Hirata in her action for compensatory damages under Title II of

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the Americans with Disabilities Act, 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). The jury's verdict for compensatory damages is based on a prior finding by the district court that the State had discriminated against disabled people like Hirata when it denied them medical assistance benefits under the State's QUEST health insurance program between August 1, 1994 and March 29, 1996. *See Burns-Vidlak v. Chandler*, 939 F. Supp. 765 (D. Haw. 1996).

The parties are familiar with the underlying facts, procedural history, and legal arguments. For the reasons stated in our concurrently filed opinion in a parallel case, *Lovell v. Chandler*, ___ F.3d ___ (9th Cir. 2002), we affirm the jury verdict.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ALBERT LUM HO, SR., Plaintiff-Appellee, v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, Defendants-Appellants.	No. 99-15670 D.C. No. CV-97-00489-BMK MEMORANDUM*

Appeal from the United States District Court
for the District of Hawaii
Barry M. Kurren, Magistrate, Presiding

Argued and Submitted November 2, 1999
Hawaii, Honolulu
Submission Withdrawn January 31, 2000
Resubmitted August 28, 2002

(Filed Sep. 5, 2002)

Before: D. W. NELSON, KOZINSKI and W. FLETCHER, Circuit Judges

The State of Hawaii appeals from the district court's judgment, following a jury trial, in favor of Albert Lum Ho in his action for compensatory damages under Title II of

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the Americans with Disabilities Act, 42 U.S.C. § 12132, and § 504 of the Rehabilitation Act, 29 U.S.C. § 794(a). The jury's verdict for compensatory damages is based on a prior finding by the district court that the State had discriminated against disabled people like Lum Ho when it denied them medical assistance benefits under the State's QUEST health insurance program between August 1, 1994 and March 29, 1996. *See Burns-Vidlak v. Chandler*, 939 F. Supp. 765 (D. Haw. 1996).

The parties are familiar with the underlying facts, procedural history, and legal arguments. For the reasons stated in our concurrently filed opinion in a parallel case, *Lovell v. Chandler*, ___ F.3d ___ (9th Cir. 2002), we affirm the jury verdict.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

In Re: Quest Cases RICHARD K. LOVELL, Plaintiff, Vs. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii, and STATE OF HAWAII, Defendants.	CIVIL NO. 97-01136 BMK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Jul. 20, 1998)

In *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 771 (D. Haw. 1996), Chief Judge Alan C. Kay determined that Defendants Susan Chandler and the State of Hawaii ("Defendants") categorically discriminated against blind and disabled individuals in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 and § 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794. Specifically, Defendants denied medical and dental coverage under the State of Hawaii's MedQuest program ("QUEST") to blind and disabled individuals who were otherwise eligible for coverage between August 1, 1994, and March 29, 1996 ("discriminatory period"). *Id.* On June 27, 1996, Judge Kay certified a class ("the *Burns-Vidlak* class") for purposes of liability for compensatory and punitive damages and for determining the proper amount of punitive damages, but directed that class members would have to

pursue claims for compensatory damages individually. *See Burns-Vidlak*, Civil No. 95-00892ACK, Order Granting in Part and Denying in Part Motion for Class Certification, filed June 27, 1995 (unpublished order). Judge Kay further determined that Defendants had engaged in "intentional discrimination," thus warranting the imposition of both general and special damages, subject to proof. *See Burns-Vidlak*, Civil No. 95-00892ACK, Order of Clarification Regarding Compensatory Damages ("Order of Clarification") at 3, filed December 19, 1997 (unpublished order). Plaintiff Richard K. Lovell ("Plaintiff") is a member of the *Burns-Vidlak* class who filed this individual action seeking general and special damages and prejudgment interest.

Pursuant to 28 U.S.C. § 636(c), Fed. R. Civ. P. 73 and Local Rule 73.1, the parties consented to trial before a United States Magistrate Judge. This case was heard at a bench trial June 7, 1998. Having carefully considered the evidence presented at trial and the arguments of counsel, the court makes the following findings of fact and conclusions of law:

BACKGROUND

For many years, Plaintiff worked as a welder/foreman for the Board of Water Supply. At some point, he developed cataracts and knee problems that rendered him disabled under state law and prevented him from working. The parties agree that he is disabled as defined by both the RA and ADA. Plaintiff began receiving state financial assistance and medical assistance, i.e., Medicaid, on or about August 28, 1991. The general financial assistance was terminated on January 31, 1993, upon Plaintiff's becoming eligible for Social Security disability benefits.

Plaintiff's receipt of Social Security disability benefits also caused his income to exceed the allowable standard for Medicaid and his Medicaid benefits were terminated on April 30, 1993. On August 1, 1994, the State initiated its QUEST insurance program, in which a group of individuals without employer-paid medical insurance and families whose income was between 100% and 300% of the federal poverty level were eligible for medical and dental services. The parties do not dispute that had Plaintiff not been disabled, he would have been eligible for QUEST during the discriminatory period. Plaintiff seeks damages for out-of-pocket costs and expenses incurred during the discriminatory period, the value of dental and medical treatment he would have received had he been enrolled in QUEST, and loss of enjoyment and pain and suffering. Plaintiff's requested damages primarily relate to his dental and eye conditions.

DISCUSSION

This court has jurisdiction pursuant to 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391, as the events from which this case arise occurred within this district. *Burns-Vidlak* class members, including Plaintiff, are entitled to compensatory damages, subject to proof, including both general and special damages for Defendants' intentional discrimination which violated both the RA and the ADA.[1] Order of Clarification at 3. Judge Kay

[1] Defendants contend that Plaintiff is not entitled to general damages, in light of the U. S. Supreme Court's recent ruling in *Gebser v. Lago Vista Independent School District*, 1998 U.S. LEXIS 4173 (June 22, 1998). This court disagrees. In that case, the Court held that

(Continued on following page)

further noted that a "full panoply" of compensatory damages is available for intentional violation of the RA. *Id.* at 5-6. Under the RA, a "plaintiff may recover compensatory damages for humiliation, embarrassment, and emotional pain and suffering[.]" *Sumes v. Andres*, 938 F. Supp. 9, 13 (D.D.C. 1996). As Judge Kay already recognized, the RA provides the basis for remedies under the ADA. *Id.* at 2. Thus, subject to proof, Plaintiff is entitled to special damages as well as general damages, for loss of enjoyment of life, as well as both physical and emotional pain and suffering.

I. Dental Condition

On December 12, 1994, Plaintiff sought treatment from Dr. William Seager for a painful toothache. Dr. Seager pulled one tooth, #31, and according to Plaintiff, recommended that two additional teeth be pulled to prevent the likelihood of pain in the near future. That same day, Plaintiff paid $60.32 cash for the removal of tooth #31, made an appointment to have more teeth pulled, and applied for state medical assistance to cover the cost of this work. Plaintiff's application for state

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damages could not be recovered against a school district for teacher-student sexual harassment in a Title IX action absent actual notice of and deliberate indifference to a teacher's misconduct by a school district official possessing authority to take corrective action on the district's behalf. *Id.* at *30. This court finds that neither the holding nor the analysis of *Gebser* is relevant to the instant action[.] In the instant case, Judge Kay determined that Defendants intentionally discriminated against the blind and disabled, notwithstanding their contention that they lacked knowledge that such conduct would violate the ADA and RA. *Gebser* addressed a situation in which there was no intentional discrimination by the respondent school district.

medical assistance was rejected solely because of his disability.[2] Dr. Seager's payment policy was and is to demand immediate payment for services and not to provide a payment plan. Following the denial of his application for state medical assistance, Plaintiff canceled his appointment for further dental work.

Plaintiff testified that approximately one month after Dr. Seager pulled tooth #31, he began to experience pain from other teeth. Plaintiff testified that he felt pain daily, but on cross-examination, he clarified that initially he felt pain approximately once per month. He treated this pain with Anbesol, an over the counter medication, and the pain subsided. Plaintiff further testified that approximately six months after tooth #31 was pulled, he broke a tooth while eating. Plaintiff reported a swollen face, rotting teeth that exuded puss, and difficulty chewing, requiring him to limit his diet to soft foods. Plaintiff again sought state medical assistance in May of 1995, and was again denied solely because of his disability.

Randolph Chun ("Mr. Chun"), Plaintiff's friend and neighbor, testified by deposition that beginning in 1994, Plaintiff called on him to help alleviate pain in his mouth. Mr. Chun helped Plaintiff cook soft foods, such as jook,[3] and put Anbesol on his teeth, sometimes as often as

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[2] Plaintiff's receipt of Social Security disability benefits caused his income to be $938.10 per month. Because he is disabled, Plaintiff was obligated to incur approximately $454.00 in medical/dental expenses per month to be eligible for QUEST. A non-disabled individual with the same income would have been eligible for QUEST without incurring any medical/dental expenses

[3] Jook is a local Chinese rice soup or gruel.

several times per day. According to Mr. Chun, Plaintiff had difficulty applying Anbesol because of vision problems. Mr. Chun further testified that Plaintiff's breath was bad.

Plaintiff saw Dr. Seager again on April 6, 1998, for a comprehensive dental examination arranged by his counsel, for which Dr. Seager charged $83.20. Dr. Seager testified that while he does not remember Plaintiff's condition in 1994, the problems evident on April 6, 1998, could only have occurred over a long period of time. He opined that Plaintiff's dental condition during the discriminatory period would have been substantially similar to his present condition. Dr. Seager testified that on April 6, 1998, Plaintiff's gums were red, inflamed, and exuding puss evidencing gum disease and infection. Some of Plaintiff's teeth were loose and other [sic] had very deep cavities. According to Dr. Seager, teeth and gums in this condition would cause pain, fatigue, swelling, and a foul odor. It would also make chewing difficult. Dr. Seager recommended that Plaintiff undergo further treatment to stabilize his teeth and prevent future pain. Specifically, Dr. Seager recommended the following: (1) extraction of tooth #1 for $50.00; (2) extraction of tooth #18 for $44.00 or $128.00 (if surgery is required); (3) extraction of tooth #20 for $44.00; (4) surgical extraction of tooth #12 for $128.00; (5) prophy and gum treatment including deep scaling and curettage for $440.00; (6) periodontal treatment by a specialist for an unknown cost; (7) restoration of tooth #6 using a buccal distal composite for $100.00, or if necessary, a root canal and post and core and porcelain crown for $775.00; (8) restoration of tooth #10 with mesial composite for $50.00, or if necessary, a root canal and post and core and porcelain crown for $775.00; (9) restoration of tooth #29 with distal occlusal amalgam for $50.00 or a composite

restoration for $88.00; and (10) partial upper and lower cast dentures for $1,440.00. Dr. Seager indicated that treatment for Plaintiff's periodontal condition would be painful, involving deep scaling and curertage under the gums, and would only be effective if Plaintiff continued very intense and dedicated care of his teeth and gums. Failure to practice rigorous oral hygiene would render the recommended periodontal treatment ineffective and could accelerate further deterioration. He further explained that he recommended partial upper and lower dentures, rather than permanent bridges, because of Plaintiff's history of poor oral care.

On April 20, 1998, Plaintiff returned to Dr. Seager because one tooth was very loose and painful. Dr. Seager removed tooth #20 at a cost of $52.00. Plaintiff spent approximately $100.00 at Longs Drug Stores for cotton swabs, Anbesol, and other over the counter pain medications during the discriminatory period.

A. Special Damages

Defendants concede liability for Plaintiff's out-of-pocket dental expenses incurred during the discriminatory period and for treatment recommended during that period. During the discriminatory period, Plaintiff paid $160.32 for the extraction of tooth #31 and over-the-counter pain medications. On December 12, 1994, in addition to pulling tooth #31, Dr. Seager recommended that Plaintiff pull two additional teeth that were in poor condition. Dr. Seager surmised that he was probably referring to teeth ## 18

and 20. On April 20, 1998, Dr. Seager pulled tooth #20 at a cost of $52.00. Plaintiff is entitled to recover this cost.[4]

Defendants further concede that QUEST would have paid in full all necessary dental and medical treatment that Plaintiff would have sought during the discriminatory period. Plaintiff testified that he initially sought treatment for a toothache in December of 1994. Based on Dr. Seager's testimony, the court finds that Plaintiff's current dental condition is substantially similar to his dental condition during the discriminatory period. Given the severity of Plaintiff's dental condition and the length of time required for this condition to develop, the court further finds that Plaintiff has not practiced good oral hygiene for some time and is not likely to begin practicing proper oral care. As the overall deterioration of Plaintiff's dental condition is of no demonstrated concern, as evidenced by a near total lack of oral care and failure to seek treatment for overall problems, the court finds that Plaintiff would not have sought treatment to correct this overall deterioration during the discriminatory period. Rather, his paramount concern was, and continues to be, remedying any acute dental condition presently causing pain and/or an inability to eat or that is likely to cause pain and/or an inability to eat in the near future. Moreover, given Plaintiff's long history of poor dental hygiene, the court finds that he

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[4] Through an unusual arrangement initiated by Dr. Seager's receptionist, Plaintiff was permitted to pay a portion of the $52.00 charge. The evidence suggests that Plaintiff has paid $20.00 of this charge to date. Although the full $52.00 charge has not been paid in full, for purposes of damages calculations, the court will include the full charge as an out-of-pocket expense.

would not have sought periodontal treatment which itself is painful and requires rigorous care to maintain.

Accordingly, the court finds that free from financial worry, Plaintiff would have undergone a comprehensive dental examination to determine which teeth were currently causing pain and which were likely to cause pain in the near future. He is therefore entitled to the $83.20 cost of Dr. Seager's comprehensive exam on April 6, 1998. Furthermore, the court finds that Plaintiff would have undergone the recommended treatment to extract those teeth in poor condition (## 1, 12, 18, and 20) and restore those teeth with severely deep cavities (## 6, 10, and 29). After the April 6, 1998 exam, Plaintiff did return to Dr. Seager to remove tooth #20 at a cost of $52.00. The total cost for the recommended extraction and restoration work, not including the estimate to remove tooth #20, is $422.00.[5] Finally, the court finds that Plaintiff would have obtained the recommended partial dentures at a cost of $1,440.00. Dr. Seager testified that partial dentures or permanent bridges would be necessary to stabilize Plaintiff's teeth following the recommended extractions. Dr. Seager testified persuasively that permanent bridges would not be appropriate for Plaintiff. Additionally, in light of Plaintiff's demonstrated concern with being able to

[5] Dr. Seager itemized his estimates as follows: (1) $50.00 to extract tooth #1; (2) $128 to surgically extract tooth #12; (3) $44.00 to extract tooth # 18; (4) $100.00 to restore tooth #6; and (5) $50 each to restore teeth ## 10 and 29. Dr. Seager indicated a higher estimate for alternative treatment of some teeth; absent proof that the more costly treatment is necessary however, Plaintiff is not entitled to the higher amount.

chew, Plaintiff would have sought partial dentures following the recommended extractions to enable him to eat.

Based on the foregoing, the court finds that Plaintiff is entitled to the following special damages for out-of-pocket expenses and the cost of treatment that Plaintiff would have had during the discriminatory period:

Extraction of tooth #31	$60.32
Extraction of tooth #20	52.00
Longs Drugs Stores (over-the-counter pain medications)	100.00
Dental exam	83.20
Extraction of teeth ## 1, 12, and 18	222.00
Restoration of teeth ## 6, 10, and 29	200.00
Partial dentures	1,440.00
TOTAL	$2,157.52

B. General Damages

Plaintiff suffered from an uncomfortable and occasionally painful dental condition relating to his inability to obtain treatment during the discriminatory period. Plaintiff was often forced to alter his diet because of pain or inability to chew and to endure a foul odor emanating from his mouth. Plaintiff testified that he was upset about the pain and his inability, at times, to eat normal foods. While Plaintiff's lack of care has contributed greatly to his overall dental condition, he nevertheless would have obtained relief had he been enrolled in QUEST during the discriminatory period. Based on the testimony of Plaintiff and Mr. Chun, the court finds that Plaintiff is entitled to $7,500.00 for loss of enjoyment and pain and suffering in connection with his dental condition.

II. Eye Condition

In August of 1992, Plaintiff saw Dr. Quarton for an evaluation of cataracts. Dr. Quarton determined that Plaintiff's vision was reduced significantly because of cataracts in both eyes. Dr. Quarton performed cataract surgery on Plaintiff's right eye on October 13, 1992. This surgery was successful leaving Plaintiff with good vision in his right eye. Surgery on the left eye was recommended and scheduled for January of 1993. All expenses incurred in connection with the surgery on Plaintiff's right eye were covered by Medicaid. Plaintiff did not return to Dr. Quarton for surgery on his left eye.

Plaintiff occasionally complained of vision problems and headaches during the discriminatory period, but did not seek medical assistance. Plaintiff testified that he did not know Medicare would cover a large portion of the cost for eye surgery until 1998. In late 1997, Plaintiff accompanied Mr. Chun to an appointment with Dr. Sherrer, an ophthalmologist. According to Plaintiff, because he was already in Dr. Sherrer's office, he decided to have the doctor check his eyes, too. Dr. Sherrer examined Plaintiff briefly on December 9, 1997, and again on March 23, 1998. He performed cataract surgery on Plaintiff's left eye on April 8, 1998. This procedure was covered by Plaintiff's Medicare policy. Plaintiff's portion of the total cost exceeds $823.85.[6]

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[6] Plaintiff itemized eye-related costs of $823.85 in his Summary of Damages Report. A close reading of Plaintiff's eye-related medical bills suggest that Plaintiff's costs were $1,354.99

Although Defendants concede liability for any out-of-pocket eye costs incurred during the discriminatory period, Plaintiff did not incur such costs. Defendants concede liability for out-of-pocket expenses for treatment that was recommended during the discriminatory period, but do not concede liability for reasonably necessary treatment that Plaintiff would not have sought during the discriminatory period.

Plaintiff testified that he did not have surgery on his left eye as scheduled in January of 1993, because his Medicaid benefits were terminated. Plaintiff's Medicaid coverage however, was not terminated until April 30, 1993. Had Plaintiff gone through with the scheduled surgery, his costs would have been covered in full. Thus, the court does not find that Plaintiff delayed his cataract surgery because his Medicaid benefits were terminated. Moreover, when Plaintiff's Medicaid benefits were terminated, Plaintiff did not report any anticipated medical expenses that could have been used to spend down his excess income. Plaintiff's failure to indicate the cost of eye surgery as an anticipated expense supports a finding that he had no intention of undergoing such surgery at that time, despite his knowledge that the surgery would correct the vision problems in his left eye.

Plaintiff also testified that he did not pursue cataract surgery on his left eye because he was preoccupied with dental pain and wished to deal with one problem at a time. This testimony is equally unpersuasive. Plaintiff canceled his scheduled surgery in January of 1993, nearly two years before he complained to Mr. Chun about any dental pain and saw Dr. Seager for treatment. Had Plaintiff experienced dental pain in January of 1993, Medicaid

would have covered those costs as well as the cost of surgery.

Moreover, Plaintiff did not exhibit any real desire to correct his eye condition during the discriminatory period. He testified that he sought QUEST coverage only in connection with dental benefits. Plaintiff did not include anticipated expenses for eye surgery on either of his QUEST applications. Plaintiff's failure to seek eye treatment when [sic] was fully covered by Medicaid belies his testimony that he would have sought this treatment had he been covered by QUEST. His failure to list anticipated expenses of eye surgery on his applications for QUEST coverage further belie [sic] his testimony. By his own admission, Plaintiff did not seek treatment for his left eye until late 1997. Even then, Plaintiff did not seek treatment because his vision was sufficiently problematic for him to initiate consultation with a doctor. Rather, Plaintiff pursued eye treatment only as a result of accompanying Mr. Chun to Dr. Sherrer's office for treatment of Mr. Chun's eyes. During that visit, Plaintiff remembered and mentioned that he needed treatment as well. Based on the foregoing, the court concludes that Plaintiff would not have sought treatment for his eye during the discriminatory period and is therefore not entitled to special or general damages in connection with his eye condition.

III. Additional Expenses and Mitigation

During the discriminatory period, Plaintiff paid Medicare premiums totaling $721.80.[7] Defendants

[7] While Plaintiff indicates his premiums totaled $887.60 and Defendants calculate them as $690.00, the court finds the correct

(Continued on following page)

correctly concede liability for these premiums, but contend that any award of damages to Plaintiff must be offset by QUEST premiums he would have paid.

Had Plaintiff been enrolled in QUEST throughout the discriminatory period, he would have been required to pay a monthly premium during the portion of time that his income exceeded 100% of the federal poverty level. From August 1, 1995, through January 31, 1996, Plaintiff's premium would have been 10% of the monthly capitated rate that State paid to the QUEST program, or $17.70 per month. Between February 1, 1996 and March 29, 1996, Plaintiff's premium would have been 25% of the monthly capitated rate, or $40.45 per month. Plaintiff's total QUEST premiums would have totaled $187.10.

Although the court finds that Plaintiff would have obtained certain dental treatment during the discriminatory period, the court does not find that Plaintiff necessarily would have sought all of that treatment prior to August 1, 1995. Rather, Plaintiff would have sought treatment when he experienced pain and/or loss of function. Beginning on August 1, 1995, Plaintiff would have become obligated to pay certain premiums for QUEST coverage. Plaintiff's failure to pay these premiums would have resulted in the discontinuation of his QUEST coverage.

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amount to be $721.80. The court calculated this figure by applying the monthly rates for each year as reported by Plaintiff in Ex. 20 at 1, to the number of months that Plaintiff would have been enrolled in QUEST had his initial application been approved. Plaintiff did not apply for QUEST until December 12, 1994, so the applicable period is from December of 1994 through March of 1996. The monthly premiums would have been $41.10 in 1994, $46.10 in 1995, and $42.50 in 1996.

Plaintiff testified that although he did not have sufficient funds to remedy his dental condition during the discriminatory period, he could cover a few reasonable discretionary living expenses. Thus, the court finds that Plaintiff could have and would have maintained his QUEST premiums in order to obtain dental treatment.

Thus, in light of the court's findings that Plaintiff would have sought necessary dental treatment during the discriminatory period and is therefore entitled to special damages for expenses incurred during the discriminatory period, and for treatment he would have sought during that period, the court further finds that Plaintiff's special damages must be reduced by the amount he would have paid in QUEST premiums, or $187.10.

Defendants urge this court to find that Plaintiff's ability to pay minor discretionary living expenses compel a finding that he failed to mitigate his damages. The court disagrees.

IV. Prejudgment Interest

Finally, Plaintiff seeks prejudgment interest on his special damages. Prejudgment interest is available, pursuant to 28 U.S.C. § 1961, under federal causes of action "where the underlying statute is silent [and] the goal of the statute is to compensate the wronged party." *Golden State Transit Corp. v. City of Los Angeles*, 73 F. Supp. 204, 210 (C.D. Cal. 1991). The Ninth Circuit has awarded prejudgment interest in discrimination actions brought pursuant to various federal statutes. *See Satterwhite v. Smith*, 744 F.2d 1380, 1381 (9th Cir. 1984) (affirming award of prejudgment interest in 42 U.S.C. § 1981 action for race discrimination); *Criswell v. Western*

Airlines Inc., 709 F.2d 544, 556-67 (9th Cir. 1983) (affirming award of prejudgment interest in age discrimination suit pursuant to the Age Discrimination in Employment Act of 1967). Prejudgment interest has also been awarded in civil rights actions brought pursuant to 42 U.S.C. § 1983. *Golden State*, 73 F. Supp. at 216.

Neither the ADA nor the RA specifically provide for or prohibit prejudgment interest. *See* 42 U.S.C. § 12133; 29 U.S.C. § 794a. In accordance with Judge Kay's prior orders and the analysis therein, the court finds that Plaintiff's entitlement to compensatory damages is for the purpose of redressing Defendants' intentional discrimination. Accordingly, this court finds that an award of prejudgment interest is appropriate. Prejudgment interest shall be calculated pursuant to 28 U.S.C. § 1961 "unless the equities of a particular case demand a different rate." *Nucorp Energy, Inc. v. Milchem, Inc.*, 902 F.2d 729, 734 (9th Cir. 1990). Section 1961 provides:

> (a) [I]nterest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . . (b) Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

28 U.S.C. § 1961.

To adequately compensate Plaintiff for Defendants' intentional discrimination, the court awards prejudgment interest on his special damages. Such interest shall be

calculated from November 2, 1995, the date the *Burns-Vidlak* case was filed, as Defendants' liability was established in that case. Plaintiff is to calculate this amount in accordance with the above and may request approval of the specific amount in conjunction with a motion for attorneys' fees.

CONCLUSION

Based on the foregoing, the court awards Plaintiff general damages of $7,500.00 for loss of enjoyment and pain and suffering in connection with his dental condition, and special damages of $2,692.22, calculated as follows:

Out-of-pocket expenses and the cost of treatment Plaintiff would have had during the discriminatory period	$2,157.52
Medicare Premiums	721.80
Subtotal	$2,879.32
Minus QUEST premiums	-187.10
TOTAL special damages	$2,692.22

The Clerk of Court is directed to enter judgment in favor of Plaintiff and against Defendants for $10,192.22. Plaintiff is further entitled to prejudgment interest on the special damages, to be calculated as set forth above. Plaintiff may seek a ruling granting a specific amount of prejudgment interest along with his request for attorneys' fees. Plaintiff may seek attorneys' fees and costs separately in accordance with Rule 54(d) of the Federal Rules of Civil Procedure.

Plaintiff seeks certification that this is a final judgment, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. This court does not believe such certification is

required. The *Burns-Vidlak* class was certified for purposes of liability for compensatory and punitive damages and for a determination of the proper amount of punitive damages. Issues related to punitive damages for the *Burns-Vidlak* class are on appeal to the Ninth Circuit. This court believes that all issues in connection with punitive damages, including Plaintiff's entitlement to a specific award, remain pending in the *Burns-Vidlak* action and do not prevent this order from being a final ruling in the instant case. Should Rule 54(b) certification be required however, it is granted, based on a finding that there is no just reason for delay.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, July 20, 1998.

/s/ Barry Kurren
Barry M. Kurren
United States Magistrate Judge

LOVELL v. CHANDLER; CIVIL NO. 97-01136 BMK; FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

In Re: Quest Cases
RICHARD K. LOVELL

Plaintiff(s),

V.

SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii, et al.

Defendant(s).

JUDGMENT
IN A CIVIL CASE

(Filed Jul. 22, 1998)

Case:
CIVIL NO.
97-01136BMK

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

[✓] **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, Judgment is entered in favor of Plaintiff and against Defendants in the total amount of $10,192.22.

cc: Bradford L. Tannen/Corianne W. Lau
Nancy Albano/Thomas R. Keller

JUL 22 1998
Date

WALTER A.Y.H. CHINN
Clerk
/s/ [Illegible]
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
OFFICE OF THE CLERK
300 ALA MOANA BLVD., RM C-338
HONOLULU, HAWAII 96850

WALTER A.Y.H. CHINN
CLERK

TEL (808) 541-1300
FAX (808) 541-1303

July 22, 1998

TO ALL COUNSEL OF RECORD

RE: CIVIL NO. 97-01136BMK, In Re: Quest Cases, LOVELL vs. CHANDLER, et al.

Dear Counsel,

Please be advised that pursuant to Rule 77, FRCP, notice is hereby given that judgment was entered on July 22, 1998. A copy is enclosed herewith. Thank you.

Sincerely yours,

WALTER A.Y.H. CHINN, Clerk

by /s/ [Illegible]
Deputy Clerk

Enclosure

cc: Bradford L. Tannen/Corianne W. Law
Nancy Albano/Thomas R. Keller
case file

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In Re: Quest Cases, DOUGLAS DELMENDO, an incapacitated person, by his appointed guardian, ZOSIMA ORILLO DELMENDO, Plaintiff, vs. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii, and STATE OF HAWAII, Defendants.	) CIVIL NO. 97-00531 BMK

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Jul. 22, 1998)

In *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 771 (D. Haw. 1996), Chief Judge Alan C. Kay determined that Defendants Susan Chandler and the State of Hawaii ("Defendants") categorically discriminated against blind and disabled individuals in violation of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132 and § 504 of the Rehabilitation Act ("RA"), 29 U.S.C. § 794. Specifically, Defendants denied medical and dental coverage under the State of Hawaii's MedQuest program ("QUEST") to blind and disabled individuals who were otherwise eligible for coverage between August 1, 1994, and March 29, 1996. *Id.* On June 27, 1996, Judge Kay certified a class

("the *Burns-Vidlak* class") for purposes of liability for compensatory and punitive damages and for determining the proper amount of punitive damages, if any such damages are to be awarded, but directed that class members would have to pursue claims for compensatory damages individually. *See Burns-Vidlak*, Civil No. 95-00892BMK, Order Granting in Part and Denying in Part Motion for Class Certification, filed June 27, 1995 (unpublished order). Judge Kay further determined that Defendants had engaged in "intentional discrimination," thus warranting the imposition of both general and special damages, subject to proof. *See Burns-Vidlak*, Civil No. 95-00892BMK, Order of Clarification Regarding Compensatory Damages ("Order of Clarification") at 3, filed December 19, 1997 (unpublished order).

Plaintiff Douglas Delmendo ("Plaintiff") is a member of the *Burns-Vidlak*, class who filed this individual action seeking general and special damages and prejudgment interest. On July 6, 1998, this court determined that Plaintiff is eligible for damages only for that period of time where he met the criteria for class membership, or more specifically, from February 15, 1995 through July 31, 1995 ("lawsuit period"). *See* Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment on Class Membership ("Order"), at 4-7, filed July 6, 1998.

Pursuant to 28 U.S.C. § 636(c), FED. R. CIV. P. 73 and Local Rule 73.1, the parties consented to trial before a United States Magistrate Judge. This case was heard at a bench trial July 7, 1998. Having carefully considered the evidence presented at trial and the arguments of counsel, the court makes the following findings of fact and conclusions of law:

BACKGROUND

Plaintiff is 42 years old, suffers from schizophrenia, and is mildly mentally retarded. The parties agree that he is disabled as defined by both the RA and ADA. Plaintiff is married to Zosima Orillo Delmendo ("Mrs. Delmendo") and they have two minor children. Because of Plaintiff's mental incompetency, Mrs. Delmendo was appointed his guardian in October of 1987. Plaintiff and his family received state financial assistance and Medicaid through December 31, 1994. Upon receipt of a lump sum payment from the Social Security Administration in December of 1994, the family became ineligible for state financial assistance and Medicaid, effective January 1, 1995. Beginning January 1, 1995, and continuing throughout the lawsuit period, the family's income was limited to Social Security benefits and minimal pay Plaintiff earned in sheltered employment. According to Mrs. Delmendo, her husband earned approximately $40.00 per month during the lawsuit period. During 1995, Plaintiff and his family received approximately $648.00 per month in Social Security payments after automatic deductions for Medicare premiums.

On August 1, 1994, the State initiated its QUEST insurance program, in which a group of individuals without employer-paid medical insurance and families whose income was between 100% and 300% of the federal poverty level were eligible for medial and dental services. Effective January 1, 1995, Plaintiff and his family received medical benefits through QUEST. On February 15, 1995, Defendants informed Plaintiff that his family would continue to receive QUEST benefits, but that he would not because of his disability. Defendants indicated that Plaintiff must pay for his own medical expenses until July 30, 1995, or

some earlier date to be established upon proof that Plaintiff spent certain amounts on medical bills.[1] The parties do not dispute that had Plaintiff not been disabled, he would have been eligible for QUEST during the lawsuit period. Plaintiff seeks damages for out-of-pocket medical costs and expenses incurred during the lawsuit period, loss of enjoyment, emotional distress, and pain and suffering.

DISCUSSION

This court has jurisdiction pursuant to 28 U.S.C. § 1331. Venue is proper pursuant to 28 U.S.C. § 1391, as the events from which this case arise occurred within this district. *Burns-Vidlak* class members, including Plaintiff, are entitled to compensatory damages, subject to proof, including both general and special damages for Defendants' intentional discrimination which violated both the RA and the ADA.[2] Order of Clarification at 3. Judge Kay

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[1] In connection with their Motion for Partial Summary Judgment on Class Membership, Defendants revealed that despite their notice to Plaintiff that he was no longer enrolled in QUEST and would have to pay his own medical bills, effective February 15, 1995, they mistakenly failed to disenroll Plaintiff from QUEST until June 30, 1995. This court ruled that Defendants were estopped from arguing that Plaintiff received QUEST coverage after February 15, 1995. *See* Order at 5.

[2] Defendants contend that Plaintiff is not entitled to general damages, in light of the U. S. Supreme Court's recent ruling in *Gebser v. Lago Vista Independent School District*, 1998 U.S. LEXIS 4173 (June 22, 1998). This court disagrees. In that case, the Court held that damages could not be recovered against a school district for teacher-student sexual harassment in a Title IX action absent actual notice of and deliberate indifference to a teacher's misconduct by a school district official possessing authority to take corrective action on the district's behalf. *Id.* at *30 This court finds that neither the holding nor the analysis of *Gebser* is relevant to the instant action. In the instant case,

(Continued on following page)

further noted that a "full panoply" of compensatory damages is available for intentional violation of the RA. *Id.* at 5-6. Under the RA, a "plaintiff may recover compensatory damages for humiliation, embarrassment, and emotional pain and suffering[.]" *Sumes v. Andres*, 938 F. Supp. 9, 13 (D.D.C. 1996). As Judge Kay already recognized, the RA provides the basis for remedies under the ADA. *Id.* at 2. Thus, subject to proof, Plaintiff is entitled to special damages as well as general damages, for loss of enjoyment of life, as well as both physical and emotional pain and suffering.

I. Medical Condition

According to Mrs. Delmendo, Plaintiff requires monthly psychiatric care and medication. During the lawsuit period, Plaintiff saw Dr. Glorifin Belmonte six times for routine psychiatric care. During the lawsuit period, Mrs. Delmendo spent whatever money the family had to cover basic necessities and Plaintiff's medical expenses.

The parties stipulated to the following facts: (1) all medical (including psychiatric) care and medications provided to Plaintiff during the lawsuit period were reasonably necessary; (2) Plaintiff's out-of-pocket expenses to Dr. Glorifin Belmonte for treatment during the lawsuit period totaled $252.84; (3) Plaintiff spent $124.73 at Longs

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Judge Kay determined that Defendants intentionally discriminated against the blind and disabled, notwithstanding their contention that they lacked knowledge that such conduct would violate the ADA and RA. *Gebser* addressed a situation in which there was no intentional discrimination by the respondent school district.

Drug Stores during the lawsuit period for reasonably necessary medications; (4) Plaintiff paid $230.52 in Medicare premiums during the lawsuit period; (5) Plaintiff spent $83.25 at Longs Drug Stores for medication on January 20, 1995; and (6) Plaintiff paid premiums of $46.74 to Physician's Mutual Insurance Company during the lawsuit period.

A. Special Damages

Defendants concede liability for Plaintiff's out-of-pocket medical expenses incurred during the lawsuit period that would have been covered by QUEST. Defendants further concede that QUEST would have covered Plaintiff's payments of $252.84 to Dr. Belmonte and $124.73 to Longs Drug Stores. The court finds that Plaintiff is not entitled to recover the January 20, 1995, payment of $83.25 to Longs Drug Stores. This amount was not incurred or paid during the lawsuit period. Furthermore, Plaintiff was covered by QUEST at that time and any failure by Longs Drug Stores to seek payment from the State, rather than Plaintiff, was not caused by Defendants' intentional discrimination. Plaintiff is also not entitled to recover the premiums paid to Physician's Mutual Insurance Company, as the policy does not provide coverage for expenses that QUEST would have covered. Nor would QUEST have covered those premiums.

Defendants correctly concede liability for Medicare premiums of $230.52, but contend that any award of damages to Plaintiff must be offset by QUEST premiums he would have paid. Had Plaintiff been enrolled in QUEST during the lawsuit period, he would have been required to pay monthly premiums of $28.16. Plaintiff's total QUEST

premiums during the lawsuit period would have been $154.88.[3] Plaintiff's failure to pay these premiums would have resulted in the discontinuation of his QUEST coverage. Because Dr. Belmonte's monthly fees for treatment exceeded the monthly QUEST premium amount, the court finds that Plaintiff would have paid these premiums had he been enrolled in QUEST. The court further finds therefore, that Plaintiff's special damages must be reduced by the amount he would have paid in QUEST premiums, or $154.88. Accordingly, Plaintiff is entitled to special damages of $453.21.

B. General Damages

Mrs. Delmendo testified that Plaintiff builds model airplanes and cars to occupy his time. He does not watch TV or enjoy other activities. When he is not occupied, he becomes upset. Since Mrs. Delmendo spent whatever money the family had to cover basic necessities and Plaintiff's medical expenses during the lawsuit period, she could not spare any money for new models. After explaining this at times to Plaintiff, he became quite upset. Plaintiff's distress resulting from the disruption in the one recreational activity he enjoyed was due to severe financial strain, which was aggravated by his lack of medical benefits. The testimony from Mrs. Delmendo was not the most articulate; however, she clearly established that for Plaintiff, who suffers from schizophrenia and is somewhat mentally retarded, building models is perhaps the only

[3] The court calculated this figure by applying half of the monthly rate for the period February 15 – 28, 1995, and the full monthly rate for each month during the period March 1 – July 30, 1995.

activity that gives Plaintiff pleasure each day. While the average person would not necessarily experience loss of enjoyment, emotional distress, or pain and suffering sufficient to warrant an award of general damages from an inability to obtain new models, Plaintiff is not an average person. For Plaintiff, this caused significant distress for short periods of time. Based on Mrs. Delmendo's testimony and the stipulated facts concerning Plaintiff's disability, the court finds that Plaintiff is entitled to $600.00 for loss of enjoyment, emotional distress, and pain and suffering.

II. Prejudgment Interest

Finally, Plaintiff seeks prejudgment interest on his special damages. Prejudgment interest is available, pursuant to 28 U.S.C. § 1961, under federal causes of action "where the underlying statute is silent [and] the goal of the statute is to compensate the wronged party." *Golden State Transit Corp. v. City of Los Angeles*, 73 F. Supp. 204, 210 (C.D. Cal. 1991). The Ninth Circuit has awarded prejudgment interest in discrimination actions brought pursuant to various federal statutes. *See Satterwhite v. Smith*, 744 F.2d 1380, 1381 (9th Cir. 1984) (affirming award of prejudgment interest in 42 U.S.C. § 1981 action for race discrimination); *Criswell v. Western Airlines Inc.*, 709 F.2d 544, 556-67 (9th Cir. 1983) (affirming award of prejudgment interest in age discrimination suit pursuant to the Age Discrimination in Employment Act of 1967). Prejudgment interest has also been awarded in civil rights actions brought pursuant to 42 U.S.C. § 1983. *Golden State*, 73 F. Supp. at 216.

Neither the ADA nor the RA specifically provide for or prohibit prejudgment interest. *See* 42 U.S.C. § 12133; 29

U.S.C. § 794a. In accordance with Judge Kay's prior orders and the analysis therein, the court finds that Plaintiff's entitlement to compensatory damages is for the purpose of redressing Defendants' intentional discrimination. Accordingly, this court finds that an award of prejudgment interest is appropriate. Prejudgment interest shall be calculated pursuant to 28 U.S.C. § 1961 "unless the equities of a particular case demand a different rate." *Nucorp Energy, Inc. v. Milchem, Inc.*, 902 F.2d 729, 734 (9th Cir. 1990). Section 1961 provides:

> (a) [I]nterest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . . (b) Interest shall be computed daily to the date of payment . . . and shall be compounded annually.

28 U.S.C. § 1961.

To adequately compensate Plaintiff for Defendants' intentional discrimination, the court awards prejudgment interest on his special damages. Such interest shall be calculated from November 2, 1995, the date the *Burn-Vidlak* case was filed, as Defendants' liability was established in that case. Plaintiff is to calculate this amount in accordance with the above and may request approval of the specific amount in conjunction with a motion for attorneys' fees.

CONCLUSION

Based on the foregoing, the court awards Plaintiff general damages of $600.00 for loss of enjoyment, emotional distress, and pain and suffering, and special damages of $453.21. The Clerk of Court is directed to enter judgment in favor of Plaintiff and against Defendants for $1,053.21. Plaintiff is further entitled to prejudgment interest on the special damages, to be calculated as set forth above. Plaintiff may seek a ruling granting a specific amount of prejudgment interest along with his request for attorneys' fees. Plaintiff may seek attorneys' fees and costs separately in accordance with Rule 54(d) of the Federal Rules of Civil Procedure.

Plaintiff seeks certification that this is a final judgment, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. This court does not believe such certification is required. The *Burns-Vidlak* class was certified for purposes of liability for compensatory and punitive damages and for a determination of the proper amount of punitive damages. Issues related to punitive damages for the *Burns-Vidlak* class are on appeal to the Ninth Circuit. This court believes that all issues in connection with punitive damages, including Plaintiff's entitlement to a specific award, remain pending in the *Burns-Vidlak* action and do not prevent this order from being a final ruling in the instant case. Should Rule 54(b) certification be required however, it is granted, based on a finding that there is no just reason for delay.

IT IS SO ORDERED.

Dated: Honolulu, Hawaii, July 22, 1998.

/s/ Barry Kurren
Barry M. Kurren
United States Magistrate Judge

DELMENDO v. CHANDLER; CIVIL NO. 97-00531 BMK; FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT

_____ DISTRICT OF HAWAII _____

In Re: Quest Cases
DOUGLAS DELMENDO,
an incapacitated person,
by his appointed guardian,
ZOSIMO ORILLO DELMENDO

Plaintiff(s),

V.

SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii, et al.

Defendant(s).

JUDGMENT IN A CIVIL CASE

(Filed Jul. 22, 1998)

Case: CIVIL NO. 97-00531BMK

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

[✓] **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, Judgment is entered in favor of Plaintiff and against Defendants in the total amount of $1,053.21.

cc: Bradford L. Tannen/Corianne W. Lau
Nancy Albano/Thomas R. Keller

JUL 22 1998
Date

WALTER A.Y.H. CHINN
Clerk

/s/ [Illegible]
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
OFFICE OF THE CLERK
300 ALA MOANA BLVD., RM C-338
HONOLULU, HAWAII 96850

WALTER A.Y.H. CHINN
CLERK

TEL (808) 541-1300
FAX (808) 541-1303

July 22, 1998

TO ALL COUNSEL OF RECORD

RE: CIVIL NO. 97-00531BMK, In Re: Quest Cases, DELMENDO, etc. vs. CHANDLER, et al.

Dear Counsel,

Please be advised that pursuant to Rule 77, FRCP, notice is hereby given that judgment was entered on July 22, 1998. A copy is enclosed herewith. Thank you.

Sincerely yours,

WALTER A.Y.H. CHINN, Clerk

by /s/ [Illegible]
Deputy Clerk

Enclosure

cc: Bradford L. Tannen/Corianne W. Lau
✓Nancy Albano/Thomas R. Keller
case file

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

HELEN HIRATA

Plaintiff(s),

V.

SUSAN CHANDLER, etc., et al.

Defendant(s).

JUDGMENT IN A CIVIL CASE

(Filed Feb. 17, 1999)

Case: CIVIL NO. 97-00503BMK

[✓] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

[ ] **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Judgment is entered in favor of Plaintiff and against Defendants in the amount of $31,983.56.

cc: Bradford Tannen/Corianne Lau, Shelby Anne Floyd, Lunsford Phillips, Aaron Schulaner, Nancy Albano, Thomas Keller, Douglas Inouye, G. Cher Foerster

FEB 17 1999
Date

WALTER A.Y.H. CHINN
Clerk

/s/ [Illegible]
(By) Deputy Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF HAWAII

ALBERT LUM HO

Plaintiff(s),

V.

SUSAN CHANDLER, etc., et al.

Defendant(s).

JUDGMENT IN A CIVIL CASE

(Filed Mar. 4, 1999)

Case: CIVIL 97-00489BMK
MASTER 97-88888

[✓] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered it's verdict.

[ ] **Decision by Court.** This action came to trial before the Court. The issues have been tried and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that Judgment is entered in favor of Plaintiff and against Defendants in the amount of $60,000.00.

cc: Bradford Tannen/Corianne Lau, Shelby Floyd, Lunsford Phillips, Aaron Schulaner, Ricky Damerville, Presley Pang, Nancy Albano, Thomas Keller, Maurice Kato, Douglas Inouye, G Cher Foerster

MAR 4 1999
Date

WALTER A.Y.H. CHINN
Clerk

/s/ [Illegible]
(By) Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII
OFFICE OF THE CLERK
300 ALA MOANA BLVD., RM C-338
HONOLULU, HAWAII 96850

WALTER A.Y.H. CHINN
CLERK

TEL (808) 541-1300
FAX (808) 541-1303

March 4, 1999

ALL COUNSEL

Re: Civil 97-00489 Lum Ho vs. Chandler, etc., et al.
Civil 97-88888

Dear Sir,

Please be advised that pursuant to Rule 77, FRCP, notice is hereby given that judgment was entered on March 4, 1999.

Sincerely yours,

WALTER A.Y.H. CHINN, CLERK

by: /s/ [Illegible]
Deputy Clerk

cc: Bradford Tannen, Corianne Lau, Shelby Floyd, Lunsford Phillips, Aaron Schulaner, Ricky Damerville, Presley Pang, Nancy Albano, Thomas Keller, Maurice Kato, Douglas Inouye, G. Cher Foerster

U.S. CONST. amend. XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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29 U.S.C. § 794 (1996)

§ 794. Nondiscrimination under Federal grants and programs; promulgation of rules and regulations

(a) Promulgation of nondiscriminatory rules and regulations; copies to appropriate committees. No otherwise qualified individual with a disability in the United States, as defined in section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

(b) "Program or activity" defined. For the purposes of this section, the term "program or activity" means all of the operations of –

(1)

(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)

(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 14101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. § 8801]), system of vocational education, or other school system;

(3)

(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

(c) Small providers; exceptions to existing facilities. Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection [enacted March 22, 1988].

(d) Standards applicable to complaints. The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

---

29 U.S.C. § 794a (1996)

§ 794a. Remedies and attorney's fees

(a) (1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5 (f) through (k)), shall be available, with respect to any complaint under section 501 of this Act [29 U.S.C. § 791], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 U.S.C. § 794].

(b) In any action or proceeding to enforce or charge a violation of a provision of this title [29 U.S.C. §§ 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

---

42 U.S.C. § 2000d-7 (1996)

§ 2000d-7. Civil rights and remedies equalization

(a) General provision.

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. § 794], title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

(b) Effective date. The provisions of subsection (a) shall take effect with respect to violations that occur in whole or in part after the date of enactment of the Rehabilitation Act Amendments of 1986 [enacted Oct. 21, 1986].

---

42 U.S.C. § 12132 (1996)

§ 12132. Discrimination

Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of

the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

---

42 U.S.C. § 12133 (1996)

§ 12133. Enforcement

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be the remedies, procedures, and rights this title provides to any person alleging discrimination on the basis of disability in violation of section 202 [42 U.S.C. § 12132].

---

42 U.S.C. § 12202 (1996)

§ 12202. State immunity.

A State shall not be immune under the Eleventh Amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this Act. In any action against a State for a violation of the requirements of this Act, remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in an action against any public or private entity other than a State.

MARGERY S. BRONSTER 4750
Attorney General of Hawaii

NANCY ALBANO 6451
MARTIN W. BASISZTA 6458
THOMAS R. KELLER 2256
Deputy Attorneys General
Department of the Attorney General, State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
Telephone: (808) 586-1300

Attorneys for Defendants
SUSAN CHANDLER and
STATE OF HAWAII

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

RICHARD K. LOVELL,

Plaintiff,

vs.

SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii, STATE OF HAWAII,

Defendants.

CIVIL NO. 97-01136 SPK

DEFENDANTS SUSAN CHANDLER AND STATE OF HAWAII'S ANSWER TO PLAINTIFF'S COMPLAINT (537) FOR DAMAGES AND INJUNCTIVE OR DECLARATORY RELIEF FILED AUGUST 29, 1997; CERTIFICATE OF SERVICE

(Filed Sep. 22, 1997)

DEFENDANTS SUSAN CHANDLER AND STATE OF HAWAII'S ANSWER TO PLAINTIFF'S COMPLAINT (537) FOR DAMAGES AND INJUNCTIVE OR DECLARATORY RELIEF FILED AUGUST 29, 1997

. . .

FOURTH DEFENSE

(Sovereign Immunity)

Plaintiff's Complaint is barred by the doctrine of sovereign immunity, where such doctrine applies.

FIFTH DEFENSE

(Eleventh Amendment Immunity)

Plaintiff's Complaint is barred by the Eleventh Amendment, where such amendment applies.

MARGERY S. BRONSTER 4750
Attorney General of Hawaii

NANCY ALBANO 6451
MARTIN W. BASISZTA 6458
THOMAS R. KELLER 2256
Deputy Attorneys General
Department of the Attorney General, State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
Telephone: (808) 586-1300

Attorneys for Defendants
SUSAN CHANDLER and
STATE OF HAWAII

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

In the Matter of QUEST Compensatory Damage Cases
DOUGLAS D. DELMENDO, an incapacitated person, by his appointed gurdian [sic], ZOSIMA ORILLO DELMENDO

Plaintiff,

vs.

SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii, STATE OF HAWAII,

Defendants.

CIVIL NO. 97-00531 ACK

DEFENDANTS SUSAN CHANDLER AND STATE OF HAWAII'S ANSWER TO FIRST AMENDED COMPLAINT (042) FOR DAMAGES AND INJUNCTIVE OR DECLARATORY RELIEF FILED DECEMBER 23, 1997; CERTIFICATE OF SERVICE

(Filed Jan. 2, 1999)

DEFENDANTS SUSAN CHANDLER AND STATE OF HAWAII'S ANSWER TO FIRST AMENDED COMPLAINT (042) FOR DAMAGES AND INJUNCTIVE OR DECLARATORY RELIEF FILED DECEMBER 23, 1997

. . .

FOURTH DEFENSE

(Sovereign Immunity)

Plaintiff's First Amended Complaint is barred by the Eleventh Amendment, where such doctrine applies.

FIFTH DEFENSE

(Eleventh Amendment Immunity)

Plaintiff's First Amended Complaint is barred by the Eleventh Amendment, where such amendment applies.

MARGERY S. BRONSTER 4750
Attorney General of Hawaii

NANCY ALBANO 6451
MARTY W. BASISZTA 6458
THOMAS R. KELLER 2256
Deputy Attorneys General
Department of the Attorney
General, State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
Telephone: 586-1300

Attorneys for Defendants
SUSAN CHANDLER and
STATE OF HAWAII

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

Helen Y. Hirata, Plaintiff, vs. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii, and STATE OF HAWAII, Defendants.	CIVIL NO. 97-00503 ACK DEFENDANTS SUSAN CHANDLER AND STATE OF HAWAII'S ANSWER TO PLAINTIFF'S COMPLAINT (64) FOR DAMAGES AND INJUNCTIVE OR DECLARATORY RELIEF FILED MAY 1, 1997; CERTIFICATE OF SERVICE (Filed Jun. 19, 1997)

DEFENDANTS SUSAN CHANDLER AND STATE OF HAWAII'S ANSWER TO PLAINTIFF'S COMPLAINT (64) FOR DAMAGES AND INJUNCTIVE OR DECLARATORY RELIEF FILED MAY 1, 1997

. . .

FOURTH DEFENSE

(Sovereign Immunity)

Plaintiff's Complaint is barred by the doctrine of sovereign immunity, where such doctrine applies.

FIFTH DEFENSE

(Eleventh Amendment Immunity)

Plaintiff's Complaint is barred by the Eleventh Amendment, where such Amendment applies.

MARGERY S. BRONSTER 4750
Attorney General of Hawaii

NANCY ALBANO 6451
MARTY W. BASISZTA 6458
THOMAS R. KELLER 2256
Deputy Attorneys General
Department of the Attorney
General, State of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
Telephone: 586-1300

Attorneys for Defendants
SUSAN CHANDLER and
STATE OF HAWAII

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

ALBERT LUMHO, SR., Plaintiff, vs. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii, and STATE OF HAWAII, Defendants.	) CIVIL NO. 97-00489 ACK) DEFENDANTS SUSAN CHANDLER AND STATE OF HAWAII'S ANSWER TO PLAINTIFF'S COMPLAINT (104) FOR DAMAGES AND INJUNCTIVE OR DECLARATORY RELIEF FILED MAY 1, 1997; CERTIFICATE OF SERVICE) (Filed Jun. 19, 1997)

DEFENDANTS SUSAN CHANDLER AND STATE OF HAWAII'S ANSWER TO PLAINTIFF'S COMPLAINT (104) FOR DAMAGES AND INJUNCTIVE OR DECLARATORY RELIEF FILED MAY 1, 1997

. . .

FOURTH DEFENSE

(Sovereign Immunity)

Plaintiff's Complaint is barred by the doctrine of sovereign immunity, where such doctrine applies.

FIFTH DEFENSE

(Eleventh Amendment Immunity)

Plaintiff's Complaint is barred by the Eleventh Amendment, where such Amendment applies.

[LOGO] DEPARTMENT OF HEALTH & HUMAN SERVICES

[Address Omitted In Printing]

JUL 16 1993

Ms. Winona E. Rubin
Director
Hawaii Department of Human Services
Health Care Administration Division
P.O. Box 339
Honolulu, Hawaii 96809-0339

Dear Ms. Rubin:

We are pleased to inform you that your application entitled "Hawaii Health QUEST Demonstration," has been approved as project No. 11-W-00001/9-01 for the period April 1, 1994, through March 31, 1999, subject to annual renewal. Approval is under the authority of section 1115 of the Social Security Act (SSA).

The approval is for a waiver-only demonstration. Enclosed are the special terms and conditions that define the nature, character, and extent of anticipated Federal involvement in this project. The award is subject to our receiving your written acceptance of the award within 30 days of the date of this letter.

The following waivers are approved for a 5-year period beginning April 1, 1994:

1. Amount, Duration, and Scope of Services – Section 1902(a)(10)(B)

   To enable the State to modify the Medicaid benefit package and to permit coverage of benefits for the demonstration populatior which are not covered for the non-demonstration population.

2. Uniformity – Section 1902(a)(1)

To enable the State to provide certain types of managed-care plans only in certain geographical areas of the State and to permit non-demonstration populations (e.g., elderly and disabled) to receive current Medicaid benefits, whereas demonstration recipients will receive slightly modified services.

3. Eligibility – Section 1902(a)(10)(A)(i)(I), (III)-(VII);
Section 1902(a)(52);
Section 1902(e)(1)(A);
Section 1902(e)(4)-(7);
Section 1902(a)(25)(G);
Section 1902(a)(34);
Section 1902(a)(51)(B);
Section 1902(a)(58);
Section 1902(a)(10)(C)(ii);
Section 1902(a)(17)(D)

To enable the State to use eligibility standards and requirements that differ from those required by law; to exempt from Medicaid coverage certain individuals who the State would otherwise be required to include under its plan; to not provide retroactive eligibility or eligibility during a transition period; to exempt as medically needy, pregnant women and children under age 18; and to exempt the State from the limits on whose income may be used to determine eligibility unless actually made available and to use instead the AFDC rules for determining whose needs and income will be counted in determining eligibility for demonstration participants.

4. Quality Review of Eligibility – Section 1902(a)(4)

To enable the State to be exempt from the current administrative procedure of reviewing the eligibility process. The State's revised eligibility process is inconsistent with the usual quality review procedure.

5. Freedom of Choice – Section 1902(a)(23)

To enable the State to restrict freedom-of-choice of provider.

6. Upper Payment Limits for Capitation Contract Requirement – Section 1902(a)(30)

To enable the State to set capitation rates that would exceed the costs to Medicaid on a FFS basis.

7. Payment of Federally Qualified Health Centers and Rural Health Clinics – Section 1902(a)(10) and Section 1902(a)(13)(E)

To enable the State to only provide Federally Qualified Community Health Center (FQHC) and Rural Health Clinic (RHC) services through managed-care providers, and not require payment to FQHCs and RHCs in accordance with Medicare cost reimbursement rules.

8. Premium Payments – Section 1902(a)(14)

To enable the State to impose premium payments that do not adhere to limits imposed in provisions of sections 1916(a)(1), (b)(1), (c), and (d) of the SSA.

9. Disproportionate Share Hospital Payments – Section 1902(a)(13)

To enable the State to reimburse hospitals for DSH payments through the capitation amount paid the health plans. The State will not pay hospitals directly.

Under the authority of section 1115(a)(2) of the SSA, expenditures made by the State for the items identified below (which are not otherwise included as expenditures under section 1903) shall, for the period of this project, be regarded as expenditures under the State's Title XIX plan.

Expenditures to provide Medicaid coverage to individuals who would otherwise be excluded by virtue of enrollment in managed-care delivery systems which do not meet all requirements of section 1903(m). Specifically, Hawaii managed-care plans will be required to meet all requirements of 1903(m), except the following:

1. 1903(m)(1)(A) and (2)(A) (except for section 1903(m)(2)(A)(iii), in order that the requirement for prior approval of contracts is not waived); 42 CFR 434.20 and 21, insofar as they restrict payment to a State that contracts for comprehensive services on a prepaid or other risk basis, unless such contracts are with entities that (a) meet Federal health maintenance organization (HMO) requirements or State HMO requirements; (b) maintain an enrollment composition of no more than 75 percent of Medicare and Medicaid enrollees; and (c) allow Medicaid members to disenroll at will on a monthly basis. The State will lock in enrollees for periods of 6 months or more.

2. 1903(f); 42 CFR 435.301 and 435.811, insofar as they restrict payment to a State for eligibles whose income

is no more than 133 1/3 percent of the AFDC eligibility level.

Your project officer for this project is Mr. Ronald W. Lambert, who can be reached at (410) 966-6624. Mr. Lambert is available to answer questions concerning the scope and implementation of the project described in your application. Communications regarding program matters should be submitted to the project officer at the following address: Health Care Financing Administration, Office of Research and Demonstrations, Room 2306 Oak Meadows Building, 6325 Security Boulevard, Baltimore, Maryland 21207-5187. Administrative correspondence concerning the project, including continuation applications, should be submitted to Ms. Joanna Bandzwolek, Health Care Financing Administration, Office of Research and Demonstrations, Room 2-C-9 Oak Meadows Building, 6325 Security Boulevard, Baltimore, Maryland 21207-5187. She may be contacted for additional administrative matters at (410) 966-6643.

We extend our congratulations on this award and look forward to working with you during the course of the project.

Sincerely,

/s/ Bruce C. Vladeck
Bruce C. Vladeck
Administrator

Enclosure

Supreme Court U.S.
FILED
DEC 9 2002
OFFICE OF THE CLERK

No. 02-545

In The

Supreme Court of the United States

STATE OF HAWAII, et al.,

Petitioners,

v.

RICHARD K. LOVELL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF RESPONDENTS IN OPPOSITION

SHELBY ANNE FLOYD*
CORIANNE W. LAU
ALSTON HUNT FLOYD & ING
Pacific Tower, Suite 1800
1001 Bishop Street
Honolulu, Hawaii 96813
(808) 524-1800

**Counsel of Record*

Counsel for Respondents

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT AND REORDERING OF THE QUESTIONS PRESENTED

Did petitioners waive their Eleventh Amendment immunity when they applied for and accepted federal financial assistance for a medical insurance program and made express representations they would comply with Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and all federal statutes relating to nondiscrimination?

Is Title II of the Americans with Disabilities Act of 1990 a proper exercise of Congress' power under Section 5 of the Fourteenth Amendment? If so, did Congress validly abrogate the states' sovereign immunity against private suits for damages with respect to discrimination in providing federally supported public services?

LIST OF PARTIES

Petitioners, defendants-appellants in the court below, are the State of Hawaii and Susan Chandler in her official capacity as the Director of the Department of Human Services of the State of Hawaii.

Respondents are Richard K. Lovell, Douglas D. Delmendo, an incapacitated person by his appointed guardian Zosima Orillo Delmendo, Helen Y. Hirata, and Albert Lum Ho, Sr., plaintiffs-appellees in the court below.

The United States of America filed a notice exercising its right to intervene pursuant to 28 U.S.C. § 2403(a) in the consolidated *Lovell* and *Delmendo* appeals.

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OPINIONS BELOW

The opinion of the court of appeals in *Lovell v. Chandler* and *Delmendo v. Chandler*, Pet. App. la, is reported at 303 F.3d 1039 (9th Cir. 2002). Unreported memorandum opinions, Pet. App. 34a, 36a, were issued by the court of appeals in *Hirata v. Chandler* and *Lum Ho v. Chandler*. The opinions of the district court in *Lovell* and *Delmendo* are unreported, and are reprinted at Pet. App. 38a, 58a. The judgments entered by the district court in *Hirata* and *Lum Ho* are reprinted at Pet. App. 72a, 73a. The opinion of the district court in *Burns-Vidlak v. Chandler*, granting plaintiffs' summary judgment on liability in favor of the class of which respondents are members, is reported at 939 F. Supp. 765 (D. Haw. 1996), and reprinted in Resp. App. 1.

JURISDICTION

The judgments of the court of appeals were entered on September 5, 2002. The petition for a writ of certiorari was filed on October 8, 2002. Jurisdiction in this case is based on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eleventh Amendment to the United States Constitution and relevant provisions of the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.*, the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.* and the Rehabilitation Act Amendments of 1986, Pub. L.

No. 99-506, § 1003, 100 Stat. 1807, 1845, 42 U.S.C. § 2000d-7, are reprinted in Pet. App. 75a-80a.

STATEMENT IN OPPOSITION

Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. § 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. *See* 29 U.S.C. § 794a(a); *Barnes v. Gorman*, 122 S.Ct. 2097 (2002); *Olmstead v. L.C.*, 527 U.S. 581, 590 n. 4 (1999).

In 1985, this Court ruled that § 504 was not clear enough to show Congress' intent to condition federal funding on a waiver of the Eleventh Amendment immunity for private damage suits against state entities. *See Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 245-246 (1985). The direct and prompt Congressional response was to enact 42 U.S.C. § 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003, 100 Stat. 1845 (1985), which provides:

> (a) General provision
>
> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 . . . , or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132. A state's Eleventh Amendment immunity was abrogated in 42 U.S.C. § 12202. In *Bd. of Trustees of the Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court held that Congress did not validly abrogate the states' immunity against suit in passing Title I of the ADA.

Last term the Court unanimously held that a state may, by litigation conduct, waive its immunity from suit for money damages. *Lapides v. Bd. of Regents*, 122 S.Ct. 1640, 1644-45 (2002). Such a waiver is not the kind of "constructive" waiver repudiated by *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675-681 (1999), but "rests upon the [Eleventh] Amendment's presumed recognition of the judicial need to avoid inconsistency, anomaly, and unfairness. . . . " *Lapides*, 122 S.Ct. at 1644.

1. Effective August 1, 1994, Hawaii launched a program known as "QUEST" to transform its Medicaid fee-for-service programs to a managed care program. Pet. App. 3a-5a. It sought and received from the United States Department of Health and Human Services ("DHHS") a waiver of specific Medicaid Act provisions, Pet. App. 26a, Resp. App. 5-6, so that it could expand its Medicaid program to include a "gap group" of persons who met Medicaid's income requirements but had assets which exceeded $2,000. Pet. App. 4a, 7a. However, by state regulation it then categorically excluded all otherwise qualified blind or

disabled people from the eligible gap group. Pet. App. 4a-5a.[1] As a result, several hundred blind and disabled people either lost medical benefits they previously received, or were denied the new QUEST benefits afforded to nondisabled persons. Pet. App. 5a, 60a.

2. Shea Burns-Vidlak, a disabled minor, through his next friend Honey Burns, and George Cohn, a blind adult, on behalf of a class of all persons similarly disabled and denied QUEST benefits, filed an action in the district court. They alleged that petitioners' conduct violated Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12131 *et seq.*, § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and 42 U.S.C. § 1983.[2] In response to plaintiffs' motion for summary judgment, petitioners raised only three defenses to liability: that they had not discriminated against plaintiffs solely because of disability, that exclusion of the disabled was "necessary to ensure the financial viability of the QUEST program," and that DHHS waived the state's obligation to comply with the ADA and § 504. Pet. App. 6a-7a. Petitioners conceded that Hawaii had "categorically denied" benefits to the class members solely by reason of disability. Resp. App. 14. Petitioners affirmed they did not assert their Eleventh

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[1] Petitioners' statement, Pet. 5, that the Secretary of DHHS approved the exclusion of the blind and disabled from the benefits provided by the QUEST program is erroneous. *See* Pet. App. 26a, 27a.

[2] The initial defendant was Susan Chandler, solely in her official capacity as Director of the Hawaii Department of Human Services. Prior to the hearing on plaintiffs' motion for partial summary judgment, plaintiffs filed a motion to amend the complaint to add the State of Hawaii as a defendant, which was granted. Chandler and the state will be referred to collectively as "Petitioners."

Amendment immunity as a defense to liability. Resp. App. 3. In its decision granting partial summary judgment on liability, the district court granted leave under 28 U.S.C. § 1292(b) for petitioners to seek an interlocutory appeal. Resp. App. 22. Petitioners did not appeal.

3. Prior to the hearing on the motion for partial summary judgment, class representatives filed a motion for class certification. The district court certified the plaintiff class for the purpose of determining liability for compensatory damages and prospectively for the purpose of determining liability for punitive damages. Pet. App. 7a. It directed the individual class members to file individual suits for determinations of actual damages.[3] Pet. App. 8a. Respondents Lovell, Delmendo, Hirata and Lum Ho did so and were awarded general and special damages after trial. Pet. App. 56a, 69a, 72a, 73a.

a. Respondent Richard Lovell was a welder who became disabled as a result of cataracts. Had he not been disabled, he was financially eligible for QUEST dental benefits. Pet. App. 39a-40a. Without the benefits, he was unable to obtain treatment for painfully decayed teeth.

b. Respondent Douglas Delmendo is mildly mentally retarded and schizophrenic. He and his family received QUEST benefits, until he was certified as disabled and received a small lump sum Social Security payment, after

[3] Petitioners' statement, Pet. 6, that class members sought in excess of $10,000,000 in damages is unsupported in the record.

which his benefits were cut off, although his family remained eligible. Pet. App. 60a-61a.

c. Respondents Helen Hirata and Albert Lum Ho were also disabled persons who were denied medical assistance benefits under the QUEST program. Pet. App. 34a, 36a.

4. The court of appeals consolidated the *Lovell* and *Delmendo* appeals. On appeal, petitioners argued that the appellate court had no jurisdiction under 28 U.S.C. § 1291 as there was no final judgment in the underlying class action. Pet. App. 12a-14a. Despite their earlier waivers, petitioners briefly raised the issue of Eleventh Amendment immunity to the ADA and § 504 claims for the first time in the initial round of briefing on appeal, but acknowledged that the Ninth Circuit had previously rejected a claim of state immunity to ADA and Section 504 claims. Pet. C.A. Br. 39. After this Court held in *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), that Congress did not validly abrogate states' immunity to suits alleging disability discrimination in employment under Title I of the ADA, 42 U.S.C. §§ 1211 *et seq.*, the court of appeals ordered supplemental briefing for the limited purpose of addressing the impact of recent decisions on arguments already made concerning the Eleventh Amendment immunity of the petitioners. Resp. App. 31. The United States then intervened on appeal in *Lovell* and *Delmendo*, pursuant to 28 U.S.C. § 2403(a), and petitioners were permitted to file a brief responding to the United States. The court of appeals affirmed the decision of the district court in its entirety. Pet. App. 33a.

With regard to the § 504 claim, the court followed, Pet. App. 16a, its recent decision in *Douglas v. California*

Department of Youth Authority, 271 F.3d 812 (9th Cir. 2001), holding that Congress validly conditioned a state's receipt of Section 504 funding on its consent to waive Eleventh Amendment immunity. With regard to the ADA, the court followed its recent decision in *Hason v. Medical Board of California*, 279 F.3d 1167 (9th Cir. 2002), *reh'g and reh'g en banc denied,* 294 F.3d 1166, *pet. for cert. granted*, No. 02-479 (U.S. November 18, 2002), finding the Eleventh Amendment does not bar claims against a state under Title II. Pet. App. 16a. It did not reach the issue whether Congress exceeded its Section 5 powers by abrogating the states' immunity to Section 504 damages claims. The decision of the court of appeals was unanimous. Petitioners did not seek rehearing.

5. The court of appeals affirmed the district court's holding in *Burns-Vidlak* that there was no material fact in dispute with respect to petitioners' violations of Section 504 and Title II, Pet. App. 19a, and as class members, respondents were entitled to recover compensatory damages, Pet. App. 30a.[4]

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[4] The court of appeals addressed the substantive defenses raised in all four appeals in its opinion in the consolidated *Lovell* and *Delmendo* appeals. However, separate memorandum opinions were issued in *Hirata* and *Lum Ho*. Pet. App. 34a-36a.

REASONS FOR DENYING THE PETITION

I. PETITIONERS' CHALLENGE TO APPELLATE JURISDICTION MAKES THIS CASE INAPPROPRIATE FOR REVIEW

In the circuit court, petitioners argued at length that the court did not have appellate jurisdiction under 28 U.S.C. § 1291 because all claims of respondents were not resolved by the trial court, and that the appeal was filed only "in an abundance of caution." Pet. App. 9a. The court of appeals held that "[T]he fact that the decisions in these separate actions incorporated by reference the reasoning and result of the *Burns-Vidlak* partial summary judgment does not make their judgments any less final," and further, that an appeal from a final judgment draws in question all earlier, non-final orders and rulings which produced the judgment. Pet. App 12a. It then addressed the merits of the *Burns-Vidlak* liability decision. Pet. App. 11a. While respondents believe the court of appeals properly rejected the jurisdictional challenge, this complicated antecedent issue impedes the clear resolution of this case on its constitutional merits, and renders this case inappropriate for review.

II. THERE ARE INDEPENDENT BASES FOR THE COURT OF APPEALS' RULING

The petition seeks review of two independent statutory bases for the court of appeals' affirmance of the district court's rulings. It does not seek review of a third independent basis upon which the district court's judgments can be sustained. Unless the Court finds that Congress does not have the authority under Section 5 of the Fourteenth Amendment to abrogate the state's sovereign immunity

from suit for violations of Title II of the ADA *and* finds that the request for and acceptance of conditioned federal funds is not a Spending Clause waiver of the state's immunity to suit for damages for violation of Section 504, *and* finds that Hawaii did not expressly waive its immunity, the court of appeals' ruling will be affirmed.

III. ON MULTIPLE OCCASIONS, PETITIONERS WAIVED SOVEREIGN IMMUNITY PROTECTIONS

There are multiple waiver issues which render this case inappropriate for consideration. "The Eleventh Amendment . . . does not automatically destroy original jurisdiction. . . . Nor need a court raise the defect on its own. Unless the state raises the matter, a court can ignore it." *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998). A state will waive its Eleventh Amendment protection if it either asserts claims of its own, *see Lapides*, 122 S.Ct. at 1643-44, or evidences a clear intent to defend the suit on the merits, *College Savings Bank*, 527 U.S. at 675-76, *citing Gunter v. Atlantic Coast Line R. Co.*, 200 U.S. 274, 284 (1906); *and quoting Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944). This issue was raised in the court of appeals, but because the court of appeals upheld the constitutionality of the abrogation provisions, it did not reach the waiver issues. Pet. App. 18A.

In the district court, petitioners asserted sovereign immunity as a defense to the § 1983 claim only. Resp. App. 3. Before the district court issued its ruling, this Court

held in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), that Congress lacks the power under Article I to subject the states to private damage suits in federal court. Although petitioners were afforded the opportunity to seek leave to immediately appeal the partial summary judgment, Resp. App. 22, they did not do so. Approximately a year later, petitioners sought summary judgment on the grounds that the Eleventh Amendment barred the class claims for punitive damages, Resp. App. 25, and appealed the denial of their motion. *See Burns-Vidlak v. Chandler*, 165 F.3d 1257 (9th Cir. 1999). The court of appeals dismissed the appeal on jurisdictional grounds, holding: "In the instant case, the State is not claiming sovereign immunity from suit in federal court. In fact, the State concedes that it is subject to suit, and answerable in money damages in federal court on the appellees' Title II and Section 504 claims." Resp. App. 28.

In its answer to the individual damages complaints filed in response to the *Burns-Vidlak* order, petitioners did assert that the complaint was barred by the doctrine of sovereign immunity "where such doctrine applies," and by the Eleventh Amendment "where such Amendment applies." Pet. App. 82a, 84a, 86a, 88a. Thereafter, petitioners defended those cases on the merits.[5] In their opening brief on appeal, Pet. C.A. Br. [1]-2, petitioners identified only two issues on appeal: whether there were material facts in dispute concerning liability, and whether there were material facts in dispute concerning damages.

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[5] The district court in *Lovell* and *Delmendo* affirmed that liability was decided in the *Burns-Vidlak* action. Pet. App. 53a-54a, 66a.

Litigation conduct such as that engaged in by petitioners has long been held to waive sovereign immunity. This Court in *Richardson v. Fajardo Sugar Co.*, 241 U.S. 44, 47 (1916) said: "Whatever might have been the merit of [defendants' immunity] position if promptly asserted and adhered to, we hold . . . that having solemnly appeared and taken the other steps above narrated, [defendant] could not thereafter deny the court's jurisdiction." The *Richardson* decision relied on an earlier ruling in *People of Porto Rico v. Ramos*, 232 U.S. 627 (1914), in which the Court held "the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step." *Id.* at 632. Petitioners expressly abandoned the opportunity to assert the immunity defense in the district court, and the belated and opaque assertion of the claim thereafter threatens the type of "inconsistency, anomal[ies], and unfairness" and "unfair tactical advantage[s]" that this Court recently held the Eleventh Amendment does not condone. *Lapides*, 122 S.Ct. at 1644-1645; *see also Wisconsin Dep't of Corr.*, 524 U.S. at 394 (Kennedy, J., concurring) ("In permitting the belated assertion of the Eleventh Amendment bar, we allow States to proceed to judgment without facing any real risk of adverse consequences. Should the State prevail, the plaintiff would be bound by principles of res judicata. If the State were to lose, however, it could void the entire judgment simply by asserting its immunity on appeal.") The existence of this dispositive question, undeveloped in the record below, is a significant potential obstacle to the Court's resolution of the Eleventh Amendment questions presented.

IV. THE DECISION OF THE COURT OF APPEALS UPHOLDING § 2000d-7 WAIVERS DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT

The decision of the court of appeals as to Section 504 is correct and does not conflict in any substantial respect with any decision of this Court. The decision of the court of appeals stated that the petitioners' arguments on the sovereign immunity issue were foreclosed by the court's decision in *Douglas v. California Dept. of Youth Auth.*, 271 F.3d at 820. A petition for certiorari was filed in *Douglas*, and was denied by this Court on other grounds. 122 S.Ct. 2591 (2002). This Court has denied a petition for a writ of certiorari in a number of other cases presenting virtually identical Eleventh Amendment issues. *See Nihiser v. Ohio Envtl. Prot. Agency*, 269 F.3d 626 (6th Cir. 2001), *cert. denied*, 122 S.Ct. 2588 (2002); *Jim C. v. U.S.*, 235 F.3d 1079 (8th Cir. 2000) (en banc), *cert. denied sub nom. Arkansas Dept. of Educ. v. Jim C.*, 533 U.S. 949 (2001); and *George Mason University v. Litman*, 186 F.3d 544 (4th Cir. 1999), *cert. denied*, 528 U.S. 1181 (2000).

1. Petitioners' ambiguity argument was never raised below, and is negated by *Lane v. Pena*

Petitioners argue that § 2000d-7 is ambiguous, failing to give requisite notice to Hawaii that its request for and acceptance of Medicaid funds would subject it to suit for damages in federal court. This notice argument is foreclosed by the decisions of this Court, as well as by petitioners' own position in this case. First, petitioners argue, Pet. at 21, that *Lane v. Pena*, 518 U.S. 187 (1996), supports their contention that § 2000d-7 is ambiguous. Section 2000d-7 was enacted in response to the Supreme

Court's holding in *Atascadero State Hosp.*, 473 U.S. 234 (1985), that Congress had not unmistakably expressed its intent to abrogate the states' Eleventh Amendment immunity in the Rehabilitation Act, and that the states, accordingly, were not "subject to suit in federal court by litigants seeking retroactive monetary relief under § 504." *Atascadero* at 235. In *Lane*, however, this Court acknowledged "the care with which Congress responded to our decision in *Atascadero* by crafting an unambiguous waiver of the States' Eleventh Amendment immunity" in Section 2000d-7. 518 U.S. at 200. This express language in *Lane*, which petitioners do not address, disposes of petitioners' ambiguity argument. There is no question that under *Lane* money damages for violations of Section 504 are available against the states, and petitioners' contention, Pet. at 26, that "[b]ecause *Lane* holds that monetary damages for violation of Section 504 are not available against federal public entities, neither are they available against the States," is clearly wrong. Moreover, petitioners' contention that § 2000d-7 is ambiguous could not be accepted without this Court reversing numerous recent decisions in addition to *Lane*, including *Alexander v. Sandoval*, 532 U.S. 275, 279-280 (2001) (Section 2000d-7 ratifies the holding in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), that private individuals may sue to enforce Section 601 of Title VI and obtain both injunctive relief and damages); *Cannon v. University of Chicago*, 441 U.S. 677 (1979) (a private right of action exists to enforce Title IX of the Education Amendments); *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992) (Section 2000d-7 "cannot be read except as a validation of *Cannon*'s holding."); *see also id.* at 78 (Scalia, J., concurring in judgment).

Petitioners never urged their interpretation of *Lane* below. To the contrary, petitioners admitted that if they had violated § 504, they would be liable for money damages, Resp. App. 12. In the court of appeals, petitioners made no argument that the language of § 2000d-7 was ambiguous, but asserted instead that Congress clearly intended to impose "its harshest possible remedies" on states. Pet. Br. In Response to Intervenor's Br. C.A. at 2-3. Moreover, although they now say, Pet. 21, that their claim follows directly from *Lane v. Pena*, petitioners have not pointed to any decision by any court in the last six years that has adopted, or even addressed, the argument that they now press. This Court should not grant further review to address such a question of first impression, before there has developed any division of authority – or even any discussion of the issue – in the courts of appeals.

2. Petitioners failed to argue below that the ADA's abrogation provisions deprived them of a meaningful waiver choice

Petitioners rely on the Second Circuit's decision in *Garcia v. State University of New York Health Sciences Center*, 280 F.3d 98 (2nd Cir. 2001), to argue that the waiver provisions of 42 U.S.C. § 2000d-7 are ambiguous. Pet. 24-25. In the court of appeals, C.A. Br. 38-40, petitioners' argument was that Section 504 was not Spending Clause legislation at all, but rather was an improper exercise of Congress' authority under Section 5 of the Fourteenth Amendment. This argument is now foreclosed by this Court's decision in *Barnes v. Gorman*, 122 S.Ct. 2097, 2103 n. 3 (2002) (stating that the Rehabilitation Act is Spending Act legislation). Therefore, petitioners' arguments in their petition were not presented to, nor addressed

by, the court of appeals.[6] This Court does not ordinarily grant review to consider questions that were neither pressed, nor passed upon, below. *See, e.g., United States v. United Foods, Inc.*, 533 U.S. 405, 416 (2001); *see also United States v. Williams*, 504 U.S. 36, 42 (1992); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 217 (1990). This is a court of "review, not one of first view," *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457 (1995), and the failure of the petitioners to press these arguments below denies this Court "the benefit of a well-developed record and a reasoned opinion on the merits." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 80 (1988). These principles are particularly compelling in a case like this because this Court could not even reach the Section 504 question raised by the petitioners without first addressing and resolving abrogation of immunity issues under Title II of the ADA.

Petitioners contend, Pet. 22, that § 2000d-7 which passed in 1986, is not effective because Congress, several years later, abrogated the states' immunity from suits for discrimination under Title II so that Hawaii lacked any

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[6] After oral argument in a letter dated October 22, 2001 to the court of appeals pursuant to Fed. R. App. P. 28(j), petitioner notified the panel of the *Garcia* holding that "a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity," and asserted this holding supported the arguments set forth at pp. 16-24 of the State's Brief in Response to the Brief of Intervenor United States. However, in this third round of briefing in the court of appeals, as in the earlier briefs, petitioners did not assert that § 2000d-7 was ambiguous. They only argued that § 2000d-7 was invalid under Section 5 of the Fourteenth Amendment, and that if it was also Spending Clause legislation, the dual source of authority made it ambiguous. C.A. Br. 21-24.

meaningful choice of retaining its immunity. Pet. at 23. In addition to the fact that this argument was not briefed in, or addressed by, the court of appeals, petitioners' argument is without merit because every state agency did know from the plain text of Section 2000d-7, from the time it was enacted, that acceptance of federal funds constituted a waiver of immunity from suit for violation of Section 504. Section 504 was not amended or altered by the enactment of Title II of the ADA in 1990 (which was not effective until 1992), and it was clear that plaintiffs could sue under either statute. *See Koslow v. Pennsylvania*, 302 F.3d 161, n. 12 (3d Cir. 2002), *citing* 42 U.S.C. § 12201(b) (preserving existing causes of action).

V. THIS CASE IS NOT APPROPRIATE FOR REVIEW OF CONGRESS' AUTHORITY TO ABROGATE A STATE'S IMMUNITY UNDER TITLE II OF THE ADA

There is a split in the circuits concerning the validity of Congress' abrogation of states' Eleventh Amendment immunity to suits brought under Title II. The Ninth Circuit in *Hason v. Medical Board of California*, 279 F.3d 1167 (9th Cir. 2002), *cert. granted,* No. 02-479 (U.S. November 18, 2002), has upheld the validity of the abrogation provision. The Fourth Circuit, in *Wessel v. Glendening*, 306 F.3d 203 (4th Cir. 2002), Fifth Circuit, in *Reickenbacker v. Foster*, 274 F.3d 974 (5th Cir. 2001), Seventh Circuit in *Walker v. Snyder*, 213 F.3d 344 (7th Cir. 2000), *cert. denied*, 513 U.S. 1190 (2001), Eighth Circuit in *Aulsbrook v. City of Maumelle*, 184 F.3d 999 (8th Cir. 1999), *cert. dismissed*, 529 U.S. 1001 (2000), and Tenth Circuit, in *Thompson v. Colorado*, 278 F.3d 1020 (10th Cir. 2001), *cert. denied*, 122 S.Ct. 1960 (2002), have held the abrogation provisions

invalid. Three other circuits have upheld Congress' authority in certain instances. *See Garcia v. SUNY Health Services Center of Brooklyn*, 280 F.3d 98 (2d Cir. 2001) (Title II comports with Congress's § 5 authority to the extent the Title II violation was motivated by discriminatory animus); *Popovich v. Cuyahoga County Court of Common Pleas*, 276 F.3d 808 (6th Cir. 2002) (en banc), *cert. denied* No. 01-1503 (U.S. Oct. 7, 2002) (Title II can validly abrogate a state's Eleventh Amendment immunity when the claim at issue implicates due process rights); *Kiman v. New Hampshire Department of Corrections*, 301 F.3d 13 (1st Cir. 2002) (Title II may validly abrogate immunity in cases in which a court identifies a constitutional violation by the state).

Presumably the Court will address this issue in *Hason, supra*. Irrespective of the ruling in *Hason*, this case, however, is not one in which the Court can clearly address those conflicts, because of issues raised concerning appellate jurisdiction, because petitioners waived the right to assert sovereign immunity as a defense and failed to present these issues on appeal, and because Section 504 constitutes an alternative wholly adequate and independent basis for the court of appeals' ruling. Other cases present far better opportunities for this Court to address the split in the circuits on the scope of immunity to Title II claims.[7] Sound principles of judicial restraint counsel against review of this case.

[7] In addition to *Hason, supra*, the Ninth Circuit affirmed its support of Title II in *Thomas v. Nakatani*, 309 F.3d 1203 (9th Cir. 2002).

CONCLUSION

For the foregoing reasons, respondents respectfully request that the petition for a writ of certiorari be denied.

December 9, 2002

Respectfully submitted,

SHELBY ANNE FLOYD*
CORIANNE W. LAU

ALSTON HUNT FLOYD & ING
Suite 1800, Pacific Tower
1001 Bishop Street
Honolulu, HI 96813
(808) 524-1800

**Counsel of Record*

APPENDIX 1

Shea T. BURNS-VIDLAK, a minor, by his mother and next friend, Honey BURNS, and George Cohn, Plaintiffs,

v.

Susan, CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii, Defendant.

Civil No. 95-00892 ACK.

United States District Court,
D. Hawai'i.,

April 12, 1996.

Bradford L. Tannen, Alston Hunt Floyd & Ing, Honolulu, HI, for plaintiffs.

Susan Barr, G. Cher Foerster, Office of the Attorney General, State of Hawaii, Honolulu, HI, for defendant.

ORDER GRANTING IN PART PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

KAY, Chief Judge.

BACKGROUND

This case involves a suit against defendant Susan Chandler, in her official capacity as the State of Hawaii's Director of Human Services, on the grounds that the State's QUEST health care program, prior to April 1,

1996,[1] violated the anti-discrimination provisions of the Rehabilitation Act and the Americans with Disabilities Act ("ADA") by categorically excluding similarly situated blind and disabled individuals from participation. Plaintiffs Shea T. Burns-Vidlak, by his mother and next friend Honey Burns, and George Cohn (collectively "Plaintiffs") also contend that the State is liable under 42 U.S.C. § 1983 because the program violated the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs filed their original complaint on November 2, 1995 and an amended complaint on January 29, 1996. On February 14, 1996, Plaintiffs filed their instant motion for partial summary judgment or, in the alternative, for preliminary injunctive relief. Plaintiffs seek partial summary judgment on the grounds that (1) the QUEST program violated the Rehabilitation Act, the ADA, and § 1983 and (2) therefore the State is liable for compensatory damages in an amount to be determined later. Plaintiffs also seek the Court to preliminarily enjoin the State from excluding Plaintiffs from receiving benefits under QUEST.

On March 4, 1996, the State filed an opposition and Plaintiffs filed a motion for class certification, which currently is scheduled for hearing on June 10, 1996. On March 11, 1996, Plaintiffs filed a reply.

This matter came before the Court for hearing on March 18, 1996. At the hearing, the parties agreed that the issue of injunctive relief would be mooted if the State implemented as planned, on April 1, 1996, an across-the-board

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[1] Unless indicated otherwise, any reference to the "QUEST" program shall refer to that program as it existed prior to April 1, 1996.

asset test for participation in the QUEST program which would eliminate any discrimination against similarly situated blind and disabled applicants. This nondiscriminatory asset test would be identical to that used for aged/blind/disabled ("ABD") recipients under Medicaid. Also on April 1, 1996, the State planned to implement its new "QUEST-Net" program, which would provide limited coverage for former QUEST and ABD recipients with more assets than allowed under Medicaid. QUEST-Net was designed not to discriminate against blind or disabled individuals solely on the basis of their disability.

The Court accordingly ordered the State to submit a report by April 8, 1996 on the implementation of changes to QUEST and of QUEST-Net and allowed Plaintiffs three days to respond. The State's report, filed April 8, 1996, indicates that neither QUEST as modified nor QUEST-Net denies coverage for blind or disabled individuals solely on the basis of their disability.[2]

Plaintiffs' "Second Supplemental Memorandum," filed April 11, 1996 in response to the State's report, states that they "do not dispute Defendant's factual statement of the current status of the proposed QUEST and QUEST-Net regulations." Plaintiffs' Second Supp. Mem. at 2. However,

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[2] The State's report also includes an unrequested and irrelevant discussion of qualified immunity. *See Kentucky v. Graham*, 473 U.S. 159, 167, 105 S.Ct. 3099, 3105-06, 87 L.Ed.2d 114 (1985) (qualified immunity not available as a defense in an official-capacity action). The Court does not appreciate such behavior and does not condone taking advantage of an opportunity to respond to a specific request from the Court by raising other matters without prior approval. Moreover, at the hearing, the State admitted that if it violated § 504 of the Rehabilitation Act, it is liable to Plaintiffs for damages.

Plaintiffs contend the issue of injunctive relief is not moot because the State has not indicated (a) whether and when the federal Health Care Financing Administration ("HCFA") approved these new regulations; and (2) whether all qualified applicants (including blind and disabled individuals) are currently receiving coverage under these programs.

The Court disagrees with Plaintiffs. First, even assuming the new regulations have not been approved by HCFA, the State already has implemented them, and they are in effect. *See* Defendant's Supp. Mem. at 2 ("The modifications to QUEST Phase I and the new QUEST-Net program went into effect as of March 30, 1996, and all QUEST participants are subject to an asset test at this time."). Plaintiffs may bring a subsequent motion for injunctive relief in the event these new regulations are found to be invalid and the State reverts to a program which impermissibly discriminates against Plaintiffs. Second, the State has indicated that all qualified individuals, including those blind and disabled, *may* receive coverage under QUEST-Net or the modified QUEST program at this time if they so choose, and, in any event, this action has not been certified as a class action at this time.

The Court accordingly dismisses as moot at this time Plaintiffs' claim for injunctive relief. The only remaining issue is the State's liability for damages.

FACTS

The State of Hawaii Department of Human Services ("DHS") formed QUEST in order to broaden the health care services and coverage provided to Hawaii residents.

QUEST integrates the preexisting fee-for-service health care plans utilized for recipients under Medicaid, AFDC, SHIP, and GA programs. Under QUEST these recipients will now receive health care through privatized managed-care health care providers rather than on a fee-for-service basis.

Phase I of the QUEST program was approved by the United States Health Care Financing Administration ("HCFA") in July 1993. Because QUEST is a pilot or "demonstration" program, HCFA granted waivers to the State of Hawaii under 42 U.S.C. § 1315 of certain statutory requirements for state health care programs mandated by 42 U.S.C. § 1396a. (Defendant's Opp., Exh. B.) In the program proposal submitted by DHS to the United States Secretary of Health and Human Services, Donna Shalala, DHS revealed the details of the QUEST program, including the fact that QUEST would not cover the aged, blind and disabled ("ABD") population. (Defendant's Opp., Exh. A at 5-1.) [3]

QUEST went into effect on August 1, 1994. Under Phase I of QUEST as it existed prior to April 1, 1996, Hawaii residents were eligible for health care coverage under QUEST if they met certain income requirements and were not blind or disabled. There was no asset limitation, although there is one now for QUEST and under QUEST-Net. Specifically, residents could participate if they earned no more than 300% of the federal poverty

[3] DHS' application to the SSA for a waiver recited that the QUEST program would comply with the Rehabilitation Act and the ADA. *See* Opp., Exh. E.

level and were not certified as blind or disabled. Those who were blind or disabled could not receive benefits under QUEST but could continue to receive health benefits under Medicaid if they satisfied its more stringent income and asset limits. Under Medicaid, income cannot exceed 100% of the federal poverty level and assets cannot exceed $2000 for a family of one or $3000 for a family of two (for families larger than two, the asset limit increases by $250 for each additional family member).

Plaintiffs claim they applied to the QUEST program and were excluded solely on the basis of their disabilities. Both plaintiffs are disabled: plaintiff Burns-Vidlak is a 16-year old disabled individual and plaintiff Cohn is legally blind. (Plaintiff's Concise Stmt. at 5.) In addition, Plaintiffs do not meet the asset limits under Medicaid: both were denied benefits under Medicaid because they do not satisfy the asset limits imposed by Medicaid.

Effective April 1, 1996, DHS has amended Phase I of QUEST to impose the same asset test as under Medicaid. However, the income limit under QUEST remains at 300% of the federal poverty level. In addition, DHS has implemented the QUEST-Net program to extend coverage to the blind and disabled population as well as others who do not qualify under the amended QUEST program. (Defendant's Opp. at 8.) QUEST-Net applies a more lenient asset test to extend coverage to those who do not satisfy the Medicaid asset limits under the amended QUEST program but provides fewer benefits.

In July 1997, DHS plans to begin Phase II of the QUEST program, which is expected to cover more individuals (including more of the ABD population) under

managed care. Phase II is not expected to deny benefits solely on the basis of blindness or disability.

SUMMARY JUDGMENT STANDARD

Summary judgment shall be granted where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). One of the principal purposes of the summary judgment procedure is to identify and dispose of factually unsupported claims and defenses. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986).

The United States Supreme Court has declared that summary judgment must be granted against a party who fails to demonstrate facts to establish an element essential to his case where that party will bear the burden of proof of that essential element at trial. *Celotex,* 477 U.S. at 322, 106 S.Ct. at 2552. "If the party moving for summary judgment meets its initial burden of identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact [citations omitted], the nonmoving party may not rely on the mere allegations in the pleadings in order to preclude summary judgment." *T.W. Elec. Serv. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir.1987).

Rather, Rule 56(e) requires that the nonmoving party set forth, by affidavit or as otherwise provided in Rule 56, specific facts showing that there is a genuine issue for trial. *T.W. Elec. Serv.,* 809 F.2d at 630. At least some "significant probative evidence tending to support the complaint" must be produced. *Id.* Legal memoranda and oral argument are not evidence and do not create issues of

fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.,* 585 F.2d 946, 952 (9th Cir.1978).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. *See Eisenberg v. Ins. Co. of North America,* 815 F.2d 1285, 1289 (9th Cir.1987) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986)). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Anderson,* 477 U.S. at 250-51, 106 S.Ct. at 2511.

The Ninth Circuit has established that "[n]o longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment." *California Architectural Bldg. Products, Inc. v. Franciscan Ceramics, Inc.,* 818 F.2d 1466, 1468 (9th Cir.1987). Moreover, the United States Supreme Court has stated that "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). Indeed, "if the factual context makes the nonmoving party's claim *implausible,* that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics,* 818 F.2d at 1468 (emphasis in original) (citing *Matsushita,* 475 U.S. at 587, 106 S.Ct. at 1356). Of course, all evidence and inferences to be drawn therefrom must be construed in the light most favorable to the nonmoving party. *T.W. Elec. Serv.,* 809 F.2d at 630-31.

DISCUSSION

I. *CLAIMS UNDER REHABILITATION ACT AND ADA*

Plaintiffs first claim that QUEST violated Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, and the ADA, 42 U.S.C. § 12132.

A. *Legal Standards*

Both the Rehabilitation Act and the ADA prohibit discrimination on the basis of disability. The Rehabilitation Act proscribes discrimination in all federally-funded programs, whereas the ADA applies only to public entities.

The Rehabilitation Act provides:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .

29 U.S.C. § 794(a).

Similarly, the ADA provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

42 U.S.C. § 12132.

In order to obtain relief under section 504 of the Rehabilitation Act, a plaintiff must show (1) that he is handicapped within the meaning of the Act; (2) that he is otherwise qualified for the services sought; (3) that he was excluded from the services sought solely by reason of his handicap; and (4) that the program in question receives federal financial assistance. *Dempsey v. Ladd,* 840 F.2d 638, 640 (9th Cir.1987); *Bonner v. Lewis,* 857 F.2d 559, 562-63 (9th Cir.1988); *Smith v. Barton,* 914 F.2d 1330, 1338 (9th Cir.1990).

Likewise, to establish a violation under the ADA the plaintiff must show (1) she is a qualified individual with disabilities; (2) she was either excluded from participation in or denied benefits of some public entity's services, programs, or activities, and (3) such exclusion, denial of benefits, or discrimination was by reason of her disability. *Tyler v. City of Manhattan,* 857 F.Supp. 800 (D.Kan. 1994).[4]

The Code of Federal Regulations has outlined a narrow exception for when discrimination is allowed under the Rehabilitation Act and the ADA. Under both acts, classification of benefits or discrimination on the basis of disability are allowed only when "necessary." For example, under the ADA:

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[4] *See also Voytek v. Univ. of California,* 1994 WL 478805 (N.D.Cal.1994), *aff'd,* 1996 WL 65243 (9th Cir.1996) (unpublished) (affirming grant of summary judgment on grounds plaintiff failed to establish prima facie case under Rehabilitation Act and noting the parties "conceded the elements of the ADA are identical to the requirements of proof under section 504 of the Rehabilitation Act").

> A public entity shall not impose or apply eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individual with a disability or any class of individuals with disabilities from fully and equally enjoying any service, program, or activity, unless such criteria can be shown to be *necessary* for the *provision of the service, program, or activity being offered.*

28 C.F.R. § 35.130(b)(8) (emphasis added).

The Section analysis of this provision in Appendix A to Part 35 states:

> This prohibition [in 28 C.F.R. § 35.130(b)(8)] *prohibits overt denials* of equal treatment of individuals with disabilities, or establishment of exclusive or segregative criteria that would bar individuals with disabilities from participation in services, benefits, or activities.
>
> . . . .
>
> In addition, paragraph (b)(8) prohibits the imposition of criteria that "tend to" screen out an individual with a disability. . . . A public entity may, however, impose *neutral* rules and criteria that screen out, or tend to screen out, individuals with disabilities if the criteria are *necessary for the safe operation* of the program in question . . . . Safety requirements must be based on actual risks and not on speculation, stereotypes, or generalizations about individuals with disabilities.

28 C.F.R. Ch. 1, Pt. 35, App. A, Analysis of § 35.130(b)(8) (July 1, 1994 ed.) (emphasis added).

Similarly, under the Rehabilitation Act:

> A recipient [of Federal financial assistance], in providing any aid, benefit, or service, may not, . . . on the basis of handicap: . . . [p]rovide different or separate aid, benefits, or services to handicapped persons or to any class of handicapped persons unless such action is *necessary* to provide qualified handicapped persons with aid, benefits, or services that are *as effective as those provided to others* . . . .

45 C.F.R. § 84.4(b)(1)(iv) (emphasis added).

The Ninth Circuit has held that Section 504 of the Rehabilitation Act "'provide[s] handicapped victims of government discrimination a private right of action for damages against the government discriminator[,]' . . . [and] allows (1) both monetary and non-monetary relief (2) against the federal government or entities receiving federal funds (3) without an exhaustion requirement." *J.L. v. Social Sec. Admin.*, 971 F.2d 260, 264 (9th Cir.1992) (quoting *Doe v. Att'y Gen'l of the United States*, 941 F.2d 780, 789 (9th Cir.1991)). The State has admitted that if it violated section 504, it is liable to Plaintiffs for damages.

The same would appear to hold for violations of the ADA, inasmuch as 42 U.S.C. § 12133, the enforcement provision for violations of § 12132 (ADA), states that remedies for violations of § 12132 shall be those set forth in 29 U.S.C. § 794a, the enforcement provision for violations of § 504 of the Rehabilitation Act. *See* 42 U.S.C. § 12117(b) (mandating that agencies coordinate standards under ADA and Rehabilitation Act so as not to produce inconsistencies); *Vande Zande v. State of Wisconsin Dept. of Admin.*, 851 F.Supp. 353, 359 (W.D.Wis. 1994) (ADA to be interpreted consistently with Rehabilitation Act);

Rivera Flores v. Puerto Rico Tel. Co., 776 F.Supp. 61 (D.Puerto Rico 1991) (noting that Title II of ADA "adopts the remedies found in the enforcement provisions of § 505 of the Rehabilitation Act"); *Torcasio v. Murray,* 57 F.3d 1340, 1342-43 n. 2 (4th Cir.1995) (assuming without deciding that monetary damages available for violations of both Rehabilitation Act and ADA).

Finally, states have no Eleventh Amendment immunity from suit in federal court for violations of § 504 of the Rehabilitation Act or the ADA. *See* 42 U.S.C. § 2000d-7(a)(1) (Rehabilitation Act and ADA); 42 U.S.C. § 12202 (ADA).

B. *Application*

Plaintiffs contend that the following undisputed facts, which the State conceded at the hearing were undisputed,[5] require granting summary judgment in their favor:

1. Plaintiffs are disabled;
2. the State denied each of the Plaintiffs health care coverage under QUEST solely on the basis of their disability;
3. Plaintiffs were otherwise qualified, aside from their disabilities, to receive coverage under QUEST;
4. QUEST receives federal financial assistance;

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[5] Later on during the hearing, Defendant retracted her concession as to fact number 2.

5. QUEST did not, until April 1, 1996, impose an asset restriction to receive coverage; and

6. Medicaid does impose an asset restriction to receive coverage, such that Plaintiffs are rendered ineligible for coverage under Medicaid.

The Court agrees. Plaintiffs have demonstrated, and the State concedes, that they were categorically denied coverage under QUEST, in comparison with nondisabled individuals in the same financial situation (that is, having similar income and assets), solely by reason of their disability. The State advances several arguments why it is not liable. None succeed.

1. *"Solely" By Reason of Disability*

First, the State argues that Plaintiffs were not discriminated against *solely* because of their disability but on the basis of financial criteria *plus* their disability, citing *Johnson v. Thompson,* 971 F.2d 1487, 1493 (10th Cir.1992), for the proposition that where "others with the same handicap do not suffer the discrimination, then the discrimination does not result 'solely by reason of [the] handicap.'" The State argues that because blind and disabled individuals with fewer assets were eligible for Medicaid, the discrimination was not based *solely* on disability.

The Court is not persuaded. First, QUEST categorically discriminated against *all* blind and disabled individuals, regardless of their financial circumstances. That some with fewer assets were protected by Medicaid does not negate the discrimination by QUEST. Second, in *Johnson,* the plaintiffs were discriminated against *in*

relation to other similarly disabled individuals by reason of their low socioeconomic status. *Id.* at 1493. Had the plaintiffs in *Johnson* been more *affluent,* they would not have been discriminated against. Here, in contrast, Plaintiffs were discriminated against in relation to other similarly situated *nondisabled* individuals – had Plaintiffs here been *nondisabled,* they would have received coverage under QUEST. Accordingly, the Court finds that discrimination under QUEST was solely by reason of Plaintiffs' disability.[6]

2. *HCFA Waiver*

The State also argues it is not liable for any violations of the Rehabilitation Act or the ADA by reason of the waiver for the QUEST program it obtained from HCFA. The State contends that the HCFA waiver implicitly exempted QUEST from the anti-discrimination provisions of the Rehabilitation Act and the ADA, although it concedes that HCFA has no express authority to effect such a waiver. *See* Opp., Exh. E (application for waiver recites that program will comply with Rehabilitation Act and ADA).

In July 1993, the State received approval for its QUEST program from HCFA. In conjunction with its approval, HCFA granted to the State waivers of certain statutory requirements under 42 U.S.C. § 1396(a) for

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[6] Defendant also argued at the hearing that QUEST, as a new demonstration program, did not *exclude* Plaintiffs but simply *included* certain classes of individuals, not including Plaintiffs. This "the cup is not half-empty, it's half-full" argument lacks merit.

"state plans for medical assistance." These waivers are authorized under 42 U.S.C. § 1315. Among other things, HCFA granted QUEST a "uniformity" waiver for the provision in 42 C.F.R. § 431.50 which requires uniformity of state Medicaid plans for all services and all eligible recipients. HCFA granted this waiver specifically because the "SSI beneficiaries" excluded from QUEST's "non-demonstration" population – that is, the ABD population as defined under Subchapter XVI of the Social Security Act, 42 U.S.C. § 1382 – will receive benefits under Medicaid whereas the non-ABD "demonstration" population will receive modified benefits under QUEST. (Defendant's Opp., Exh. A at 6-1.)

The Court does not agree that the HCFA waiver waived compliance by the State with the Rehabilitation Act and the ADA. First, 42 U.S.C. § 1315 authorizes waivers only for requirements under 42 U.S.C. §§ 302, 602, 654, 1202, 1352, 1382, and 1396a – the Rehabilitation Act and the ADA are not included. Second, none of the statutes for which § 1315 authorizes waivers contain anti-discrimination provisions.

Finally, it does not appear that the Social Security Administration has the authority to waive a state's compliance with the Rehabilitation Act or the ADA. *See J.L. v. Social Sec. Admin.*, 971 F.2d 260, 268 (9th Cir.1992) ("SSA has no discretion to violate the Rehabilitation Act."); *see also Alexander v. Choate,* 469 U.S. 287, 301, 105 S.Ct. 712, 720, 83 L.Ed.2d 661 (1985) ("[A]n otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be *defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled* [.]") (emphasis

added). Although *J.L.* involved the SSA's own regulations, its authority to "waive" compliance with anti-discrimination requirements would seem to be greater when regulating itself than when regulating others (that is, states). The Court accordingly finds that the HCFA waiver did not waive the State's requirement to comply with the Rehabilitation Act and the ADA.

3. *"Necessity"*

Finally, the State contends the "necessity" exceptions outlined in the Code of Federal Regulations absolve the State of liability. The State argues that QUEST does not violate the Rehabilitation Act or the ADA because it is "necessary" to exclude disabled individuals to ensure the financial viability of the program, citing at the hearing 45 C.F.R. § 84.4(b)(1)(iv) (Rehabilitation Act), quoted above in Section I.A., and 28 C.F.R. § 35.130(b)(1)(iv) (ADA).[7]

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[7] 28 C.F.R. § 35.130(b)(1)(iv) provides:

> A public entity, in providing any aid, benefit, or service, may not, . . . on the basis of disability, [p]rovide different or separate aids, benefits, or services to individuals with disabilities . . . than is provided to others unless such action is *necessary to provide qualified individuals with disabilities with aids, benefits, or services that are as effective as those provided to others*[.]

Id. (emphasis added).

The Section Analysis of this paragraph states:

> Paragraph (b)(1)(iv) permits the public entity to develop separate or different aids, benefits, or services when necessary to provide individuals with disabilities with an *equal opportunity* to participate in or benefit from the public entity's programs or activities, but only when necessary to ensure that the aids, benefits, or services are as effective as

(Continued on following page)

In particular, the State claims that in order to move from a fee-for-service health care plan to a managed health care plan like QUEST, QUEST needed to exclude the ABD population because the private health care providers to be utilized under QUEST lacked actuarial data on this group and, as a result, might have shied away from participating. Moreover, the ABD population purportedly has substantially higher health costs than the non-ABD population, so including the ABD group in the QUEST plan could particularly risk the financial viability of QUEST. *See* Defendant's Opp., Exh. C at i (noting that health care costs for the average ABD individual are 150% higher than for those in the AFDC, AFDC-related, GA and SHIP groups).[8]

Both provisions cited by the State however prohibit the provision of *different or separate* benefits to disabled individuals unless "such action is necessary to provide qualified handicapped persons with aids, benefits, or services that are as effective as those provided to others." Moreover, even where such different or separate benefits are provided to disabled individuals, they must be given

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> those provided to others. . . . Even when separate or different aids, benefits, or services would be more effective, . . . a qualified individual with a disability *still has the right to choose to participate in the program that is not designed to accommodate individuals with disabilities.*

28 C.F.R. Ch. 1, Part 35, App. A, Section Analysis of § 35.130(b)(1)(iv) (July 1, 1994 ed.) (emphasis added).

[8] The Court notes however that at the hearing, the State admitted that raw actuarial data on the ABD population was available in computer format prior to the implementation of QUEST.

an "equal opportunity" and the right to participate in the program that was not designed for them.

First, it is clear that the State's "financial viability" argument fails as a matter of law. This is not a case where Plaintiffs were offered participation in a separate program in order to provide them with benefits just as effective as those provided to nondisabled individuals but still given the right to "opt out" of the separate program and participate instead in the general population program. Instead, Plaintiffs both were categorically excluded from participation in QUEST and were not offered participation in a separate program "as effective" as QUEST.

Second, even if the State were to rely on 28 C.F.R. § 35.130(b)(8), which prohibits discrimination unless "necessary for the provision of the service . . . being offered," the section analysis of this provision makes clear, as Plaintiffs point out, that this provision "prohibits overt denials of equal treatment of individuals with disabilities."[9]

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[9] At the hearing, Defendant appeared to have abandoned her reliance on this provision in light of the language quoted. Plaintiffs argued that pursuant to 28 C.F.R. § 35.130(b)(8), (1) overt discrimination is prohibited and (2) neutral rules having a "disparate impact" may be allowed but (3) only if such neutral rules are "necessary for the *safe operation* of the program in question." 28 C.F.R. Ch. 1, Part 35, App. A, Section Analysis of § 35.130(b)(8) (July 1, 1994 ed.) (emphasis added). The Court agrees that the language of the section analysis supports Plaintiffs' interpretation.

II. *SECTION 1983*

In addition to their Rehabilitation Act and ADA claims, Plaintiffs also seek damages[10] under 42 U.S.C. § 1983 on the grounds that QUEST violated the Equal Protection Clause of the Fourteenth Amendment by discriminating against the blind and disabled.[11]

First, the Court notes it has found that Plaintiffs may recover under the Rehabilitation Act and the ADA directly. The Court also finds that Plaintiffs' § 1983 claims for damages are barred by the Eleventh Amendment. *See Quern v. Jordan,* 440 U.S. 332, 341, 99 S.Ct. 1139, 1145, 59 L.Ed.2d 358 (1979) (§ 1983 does not override traditional sovereign immunity of states under Eleventh Amendment); *Blaylock v. Schwinden,* 862 F.2d 1352, 1353-54 (9th Cir.1988) (damages claims against state officials sued in their official capacities are barred by sovereign immunity); *Eisfelder v. Michigan Dept. of Natural Resources,* 847 F.Supp. 78, 82 (W.D.Mich.1993) (dismissing § 1983 claim under Eleventh Amendment but retaining claims under Rehabilitation Act and ADA).[12]

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[10] As discussed above, their claim for injunctive relief is moot.

[11] To the extent Plaintiffs base their § 1983 claim solely on a violation of the Rehabilitation Act or the ADA, it appears unsettled in the Ninth Circuit whether these acts provide a sufficiently comprehensive remedial structure so as to bar, under *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n,* 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981), § 1983 claims based on their violation. *See Smith v. Barton,* 914 F.2d 1330, 1335 (9th Cir.1990) (noting "disagreement over whether Congress intended to foreclose section 1983 claims that could have been brought under the Rehabilitation Act").

[12] Suits against state officers for declaratory or injunctive relief are not barred by the Eleventh Amendment, even if the injunctive relief

(Continued on following page)

CONCLUSION

For the foregoing reasons the Court GRANTS IN PART Plaintiffs' motion for partial summary judgment. The Court finds that Plaintiffs are entitled to recover damages under the Rehabilitation Act and the ADA for discrimination under QUEST prior to its amendment on March 30, 1996.[13] The Court DISMISSES Plaintiffs' § 1983 claims for lack of jurisdiction. Finally, the Court DISMISSES Plaintiffs' request for preliminary injunctive relief as moot.

The Court recognizes that the State has made a good faith effort to implement improved and more cost effective health care services through QUEST. Yet Congress has proscribed such discrimination against the blind and disabled even during a transition period leading finally to equal benefits. The State could have included at the outset in QUEST the relatively small number of individuals in Plaintiffs' class, with or without reducing benefits across the board in order to accommodate them. The Court appreciates that this determination comes at a time when the State is suffering a serious shortage of funds. Nevertheless, Congress has mandated nondiscriminatory treatment of the blind and disabled and their rights must be upheld.

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costs the state money, so long as the money is for prospective relief. *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) (prospective declaratory and injunctive relief in suit against state official sued in official capacity not barred by Eleventh Amendment); *Edelman v. Jordan,* 415 U.S. 651, 661-69, 94 S.Ct. 1347, 1355-58, 39 L.Ed.2d 662 (1974) (discussing how prospective injunctive relief can drain state coffers). Here, however, Plaintiffs' request for injunctive relief is moot.

[13] The State has indicated that QUEST-Net as well as the modifications to QUEST Phase I went into effect as of March 30, 1996.

Pursuant to 28 U.S.C. § 1292(b), the Court is of the opinion that its finding of liability on the part of the State under the Rehabilitation Act and the ADA "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Specifically, if it is held that the State did not violate these acts and that it otherwise is not liable to Plaintiffs for damages, numerous individual determinations of such damages may be avoided. Accordingly, if the Ninth Circuit permits appeal from this order, further proceedings in this action will be stayed pending that appeal.

IT IS SO ORDERED.

APPENDIX 2

Shea T. BURNS-VIDLAK, a minor, by his mother and next friend Honey BURNS; George Cohn, Plaintiffs-Appellees,

v.

Susan CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; The State of Hawaii, Defendants-Appellants.

No. 97-16329.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Nov. 4, 1998.

Decided Jan. 22, 1999.

Girard D. Lau, Deputy Attorney General, Honolulu, Hawaii, for the defendants-appellants.

Shelby Anne Floyd and Bradford L. Tannen, Alston, Hunt, Floyd & Ing, Honolulu, Hawaii, for the plaintiffs-appellees.

Gregory B. Friel, United States Department of Justice, Washington, D.C., for the amicus.

Appeal from the United States District Court for the District of Hawaii; Alan C. Kay, District Judge, Presiding. D.C. No. CV-95-00892-ACK.

Before: ALFRED T. GOODWIN, ROBERT R. BEEZER and T.G. NELSON, Circuit Judges.

BEEZER, Circuit Judge:

Susan Chandler, in her official capacity as the director of the Department of Human Services of the State of

Hawaii, and the State of Hawaii [collectively hereinafter "the State"] appeal the denial of their motion for partial summary judgment on the question whether punitive damages are available against a state under Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 (1994) [hereinafter "Title II"], and section 504 of the Rehabilitation Act, 29 U.S.C. § 794 (1994) [hereinafter "Section 504"]. We dismiss this appeal for lack of subject matter jurisdiction.

I

This suit involves a challenge under Title II and Section 504 to Hawaii's QUEST[1] health care program. Burns-Vidlak claims that the categorical exclusion of blind and disabled persons from participation in the QUEST program prior to April 1, 1996 constituted unlawful discrimination in violation of Title II and Section 504. Burns-Vidlak originally filed this action solely against Susan Chandler, in her official capacity as the director of Hawaii's Department of Human Services. *See Burns-Vidlak,* 939 F.Supp. at 766. The district court granted partial summary judgment in favor of Burns-Vidlak, holding, as a matter of law, that Hawaii's exclusion of blind and disabled individuals from the QUEST program violated Title II and Section 504. *See id.* at 771-73. The

[1] The QUEST program represents Hawaii's attempt to "integrate [ ] the preexisting fee-for-service health care plans utilized for recipients under Medicaid, AFDC, SHIP, and GA programs. Under QUEST these recipients will now receive health care through privatized managed-care health care providers rather than on a fee-for-service basis." *Burns-Vidlak v. Chandler,* 939 F.Supp. 765, 767 (D.Haw.1996).

court further held, and Hawaii conceded, that monetary damages are available to compensate injuries caused by Hawaii's violation of Title II and Section 504. *See id.* at 773, 770.

The district court subsequently allowed Burns-Vidlak to amend his complaint to add the State of Hawaii as a defendant and to seek punitive damages against both defendants. The State then moved for partial summary judgment, claiming that the Eleventh Amendment[2] shields it from exposure to punitive damages under Title II and Section 504. The district court denied the State's motion and the present appeal followed.

II

In general, only final judgments of a district court may be reviewed on appeal.[3] *See Midland Asphalt Corp. v. United States,* 489 U.S. 794, 798, 109 S.Ct. 1494, 103 L.Ed.2d 879 (1989). A district court's decision in a civil case is final if it "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *California v. Campbell,* 138 F.3d 772, 776 (9th Cir. 1998) (quoting *Catlin v. United States,* 324 U.S. 229, 233,

[2] "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. This withdrawal of jurisdiction also shields unconsenting states from suits brought in federal court by its own citizens. *See Edelman v. Jordan,* 415 U.S. 651, 662-63, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

[3] "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . . " 28 U.S.C. § 1291 (1994).

65 S.Ct. 631, 89 L.Ed. 911 (1945)). As the State acknowledges, the district court's order denying its motion for partial summary judgment is not a "final decision" under 28 U.S.C. § 1291. Accordingly, the State urges the panel to ground its subject matter jurisdiction in the collateral order doctrine as articulated in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

The *Cohen* collateral order doctrine is "a narrow exception to the normal application of the final judgment rule," *Midland*, 489 U.S. at 798, 109 S.Ct. 1494, which "recognizes that a limited class of prejudgment orders is sufficiently important and sufficiently separate from the underlying dispute that immediate appeal should be available," *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375, 107 S.Ct. 1177, 94 L.Ed.2d 389 (1987). The collateral order doctrine permits an appeal from a non-final judgment provided three criteria are satisfied: the "order must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Midland*, 489 U.S. at 799, 109 S.Ct. 1494 (internal quotation marks omitted). The State bears the burden of demonstrating that all three requirements are fulfilled. *See Stringfellow*, 480 U.S. at 375, 107 S.Ct. 1177.

The Supreme Court has emphasized that the conditions for collateral order appeal are to be stringently applied to ensure that this narrow exception "never be allowed to swallow the general rule" requiring a judgment to be final prior to appeal. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868, 114 S.Ct. 1992, 128 L.Ed.2d 842 (1994). We therefore determine the applicability of the

collateral order doctrine "without regard to the chance that the litigation at hand might be speeded, or a particular injustice averted, by a prompt appellate court decision." *Id.* (internal citation and quotation marks omitted).

We find it unnecessary to address the first two criteria of the *Cohen* test because we conclude that the State has failed to satisfy the third criterion. The State claims that, in light of *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy,* 506 U.S. 139, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993), the district court's determination that punitive damages are available against the State under Title II and Section 504 is effectively unreviewable on appeal. The State is mistaken.

In *Metcalf & Eddy,* the Supreme Court held that states may invoke the *Cohen* collateral order doctrine to appeal immediately a district court order denying a claim of Eleventh Amendment immunity from suit in federal court. *Id.* at 141, 113 S.Ct. 684. The Court grounded its holding in the recognition that the Eleventh Amendment "confers an immunity from suit [in federal court]"[4] and that this protection would be " 'effectively lost if a case is erroneously permitted to go to trial.' "[5] *Id.* at 144, 113 S.Ct. 684 (quoting *Mitchell v. Forsyth,* 472 U.S. 511, 526, 105

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[4] *See also Alaska v. United States,* 64 F.3d 1352, 1355 (9th Cir.1995) ("[T]he Eleventh Amendment . . . allow[s] one sovereign entity the right to avoid, altogether, being subjected to litigation in another sovereign's courts.").

[5] *See also Sofamor Danek Group, Inc. v. Brown,* 124 F.3d 1179, 1183 n. 2 (9th Cir.1997) ("[T]he central benefit of [Eleventh Amendment] immunity, the right not to stand trial in the first instance, is effectively lost if a case is erroneously permitted to proceed to trial.").

S.Ct. 2806, 86 L.Ed.2d 411 (1985)). Put differently, a district court's denial of a state's entitlement to Eleventh Amendment immunity is "effectively unreviewable on appeal from a final judgment," *Midland,* 489 U.S. at 799, 109 S.Ct. 1494 (internal quotation marks omitted), since the harm to the state's "dignitary interests" in not being haled into another sovereign's court in the first instance cannot be undone, *Metcalf & Eddy,* 506 U.S. at 146, 113 S.Ct. 684.

In the instant case, the State is not claiming sovereign immunity from suit in federal court.[6] In fact, the state concedes that it is subject to suit, and answerable in money damages, in federal court on the appellees' Title II and Section 504 claims. *See Burns-Vidlak v. Chandler,* 939 F.Supp. 765, 770 (D.Haw.1996). Rather, the State invokes the Eleventh Amendment merely as a defense to liability for punitive damages under Title II and Section 504. But a "defense to the payment of money . . . is far removed from the kind[ ] of immunit[y] from the judicial process involved

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[6] Even if the State *were* claiming Eleventh Amendment immunity from suit in federal court, the plain language of the Rehabilitation Act and the Americans with Disabilities Act ["ADA"] makes it clear that Congress has unequivocally abrogated the states' immunity from suit in federal court under those statutes. *See* 42 U.S.C. § 2000d-7(a)(1) (1994) ("A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of Section 504 of the Rehabilitation Act of 1973. . . . ") and 42 U.S.C. § 12202 (1994) ("A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of [the ADA]."). *See also Clark v. California,* 123 F.3d 1267, 1269 (9th Cir.1997) ("Congress has unequivocally expressed its intent to abrogate the State's immunity [from suit in federal court] under both the ADA and the Rehabilitation Act.").

in *Metcalf & Eddy. . . .* " *Pullman Constr. Indus., Inc. v. United States,* 23 F.3d 1166, 1169 (7th Cir. 1994). "The foundation for the interlocutory appeal authorized by [*Metcalf & Eddy*] is the existence of a right not to be a litigant. . . . Once the [state] defendants concede that the litigation is proper, they undermine any claim of entitlement to an interlocutory appeal." *Mercer v. Magnant,* 40 F.3d 893, 896-97 (7th Cir. 1994).

Indeed, the Supreme Court has made it clear that a potentially "erroneous ruling on liability may be reviewed effectively on appeal from final judgment."[7] *Swint v. Chambers County Commission,* 514 U.S. 35, 43, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995). Thus, the State has failed to satisfy the third criterion of the *Cohen* test, rendering the district court's order denying the State's motion for partial summary judgment an unappealable collateral order. APPEAL DISMISSED.

[7] We have expressed a similar view in the context of federal sovereign immunity: "Because federal sovereign immunity is a defense to liability rather than a right to be free from trial, the benefits of immunity are not lost if review is postponed." *Alaska v. United States,* 64 F.3d 1352, 1356 (9th Cir.1995).

APPENDIX 3

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RICHARD K. LOVELL, Plaintiff-Appellee, v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, Defendants-Appellants.	Nos. 98-16545; 99-15930 D.C. No. CV-97-01136-BMK
DOUGLAS D. DELMENDO, an incapacitated person, by his appointed guardian-Zosima Orillo Delmendo, Plaintiff-Appellee, v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, Defendants-Appellants.	Nos. 98-16548; 99-15928 D.C. No. CV-97-00531-BMK (Filed May 18, 2001)

HELEN Y. HIRATA, Plaintiff-Appellee, v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, Defendants-Appellants.	No. 99-15554 D.C. No. CV-97-00503-BMK
IN RE: QUEST COMPENSATORY DAMAGE CASES	No. 99-15670 D.C. No. CV-97-00489-BMK
ALBERT LUM HO, SR., Plaintiff-Appellee, v. SUSAN CHANDLER, in her official capacity as the Director of the Department of Human Services of the State of Hawaii; STATE OF HAWAII, Defendants-Appellants.	ORDER

Before: D.W. NELSON, KOZINSKI, and W. FLETCHER, Circuit Judges

* * *

Defendants-appellants are directed to file an opening brief, not to exceed 15 pages, within 45 days of this order,

directed to the question of sovereign immunity under the Eleventh Amendment in light of cases decided since the original appellate briefing in these cases.

Plantiffs-appellees are directed to file a single opposing brief, not to exceed 15 pages, within 30 days of filing by the defendants-appellants.

* * *

Supreme Court U.S.
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No. 02-545

In the Supreme Court of the United States

SUSAN CHANDLER, DIRECTOR OF HUMAN SERVICES AND HAWAII, PETITIONERS

v.

RICHARD K. LOVELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
RALPH F. BOYD, JR.
Assistant Attorney General
JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

22 pp

QUESTIONS PRESENTED

1. Whether Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. 12131-12165, is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' sovereign immunity against private suits for damages.

2. Whether the State of Hawaii, by accepting federal funds for its Department of Human Services, waived its sovereign immunity against private suits for damages for violation of Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a).

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In the Supreme Court of the United States

No. 02-545

SUSAN CHANDLER, DIRECTOR OF HUMAN SERVICES AND HAWAII, PETITIONERS

v.

RICHARD K. LOVELL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in the cases brought by respondents Lovell and Delmendo (Pet. App. 1a-33a) is reported at 303 F.3d 1039. The opinions of the court of appeals in the cases brought by respondents Hirata and Lum Ho (Pet. App. 34a-37a) are not reported. The opinions and judgments of the district court in each case (Pet. App. 38a-55a, 58a-68a, 72a-73a) are not reported.

JURISDICTION

The court of appeals entered its judgment on September 5, 2002. The petition for a writ of certiorari was

filed on October 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

1. a. The Americans with Disabilities Act of 1990 (Disabilities Act), 42 U.S.C. 12101 *et seq.*, is a "comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. 12101(b)(1). The Disabilities Act targets three particular areas of discrimination against persons with disabilities. Title I, 42 U.S.C. 12111-12117, addresses discrimination by employers affecting interstate commerce; Title II, 42 U.S.C. 12131-12165, addresses discrimination by governmental entities; and Title III, 42 U.S.C. 12181-12189, addresses discrimination in public accommodations operated by private entities. In passing the Disabilities Act, Congress "invoke[d] the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities." 42 U.S.C. 12101(b)(4).

By its terms, the Disabilities Act's prohibitions on discrimination are enforceable against public entities through private suits. See, *e.g.*, 42 U.S.C. 12133; see also *Olmstead* v. *L.C.*, 527 U.S. 581, 590 (1999). In the Disabilities Act, Congress expressly abrogated the States' Eleventh Amendment immunity to private suits in federal court. 42 U.S.C. 12202 (a "State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of this chapter").

This case involves a suit under Title II of the Disabilities Act, which provides that "no qualified individ-

ual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. A "public entity" is expressly defined to include "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. 12131(1)(A) and (B).

b. Section 504(a) of the Rehabilitation Act of 1973 prohibits any "program or activity receiving Federal financial assistance" from "subject[ing any person] to discrimination" on the basis of disability. 29 U.S.C. 794(a). Individuals have a private right of action for damages against entities that receive federal funds and violate that prohibition. See 29 U.S.C. 794a(a); *Barnes* v. *Gorman*, 122 S. Ct. 2097 (2002); *Olmstead*, 527 U.S. at 590 n.4.

In 1985, this Court held that Section 504's text was not sufficiently clear to evidence Congress's intent to condition federal funding on a waiver of Eleventh Amendment immunity for private damage actions against state entities. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 245-246 (1985). In response to *Atascadero*, Congress enacted 42 U.S.C. 2000d-7 as part of the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, Tit. X, § 1003(a), 100 Stat. 1845. Section 2000d-7(a) provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794] * * *.

> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

2. In November 1995, Shea Burns-Vidlak, a minor with a disability, and George Cohn, a blind adult, filed suit against petitioners under Title II of the Disabilities Act and Section 504 of the Rehabilitation Act to challenge the exclusion of certain individuals with disabilities from participation in a state health insurance program, known as QUEST. Pet. App. 6a. State law categorically excludes from participation in QUEST those "[p]ersons who are blind or disabled according to the criteria employed by the Social Security Administration," Haw. Admin. R. § 17-1727-13(2) (1994). See Pet. App. 4a-5a.

The district court granted partial summary judgment against the petitioners, concluding that the exclusionary criteria violated both Title II and Section 504. *Burns-Vidlak* v. *Chandler*, 939 F. Supp. 765, 769-773 (D. Haw. 1996); see also Pet. App. 2a, 7a. The district court ordered further proceedings to determine whether petitioners were liable for punitive damages, and those proceedings remain pending in district court.

Two months after entering its partial summary judgment order, the district court certified a class of individuals "for the already decided question of general liability for compensatory damages, and for the undecided question of the State's liability for punitive damages." Pet. App. 7a-8a. The district court then directed the individual class members to file independent law-

suits to determine their individual entitlement to damages. *Id.* at 2a-3a, 6a-7a.

More than 300 persons subsequently filed individual actions for compensatory damages, including respondents. In those individual actions, the district court did not permit petitioners to contest the *Burns-Vidlak* liability determination. Pet. App. 20a n.7 After a bench trial, respondents each were awarded compensatory damages. Pet. App. 3a, 8a-9a, 54a, 67a. The district court certified its damages awards as final judgments under Federal Rule of Civil Procedure 54(b).

3. The court of appeals affirmed. Pet. App. 1a-33a. The court first rejected petitioners' argument that the court lacked jurisdiction over the appeal. *Id.* at 9a-14a. Petitioners argued that they filed the appeal only "in an abundance of caution," *id.* at 9a, and that, in fact, there was no final judgment for the court to review because the partial summary judgment entered in *Burns-Vidlak*, which established petitioners' liability on the merits, was not yet final. The court of appeals rejected that argument, concluding that the "unique procedural posture" of the case, *id.* at 10a, did not require the Court to await the conclusion of proceedings in the class action before reviewing the award of damages in the individual cases before it. In so holding, the court acknowledged that "we will need, in effect, to review the merits of the partial grant of summary judgment in *Burns-Vidlak* in order to decide the current appeals," *id.* at 11a.

On the merits, the court of appeals held (Pet. App. 14a-18a) that the damages awards were not barred by the Eleventh Amendment. Relying on prior circuit precedent, the Court held (*id.* at 15a-16a) that Congress validly abrogated the States' sovereign immunity for claims under Title II of the Disabilities Act and that, by

accepting federal funds conditioned on a waiver of sovereign immunity, the State had waived its immunity to claims under Section 504. The Court further held (*id.* at 17a) that, under the Spending Clause, Congress validly conditioned receipt of federal funds on a waiver of immunity. See also *id.* at 34a-37a (judgments in favor of respondents Lum Ho and Hirata summarily affirmed in light of the decision in Lovell's and Delmondo's appeal).

ARGUMENT

1. On November 18, 2002, this Court granted certiorari in *California Medical Board* v. *Hason*, No. 02-479, to address the question whether Title II of the Americans with Disabilities Act of 1990 is a proper exercise of Congress's power under Section 5 of the Fourteenth Amendment, thereby constituting a valid exercise of congressional power to abrogate the States' sovereign immunity against private suits for damages. Because the first question presented in this case raises that same question, the Court may wish to hold the petition pending the Court's decision in *Hason*.

There are, however, four reasons why this case does not merit an exercise of this Court's certiorari jurisdiction and why, accordingly, the Court could deny this petition notwithstanding the pendency of *Hason*.

First, although petitioners now assert that there are no jurisdictional or prudential barriers to review in this case, Pet. 17 n.10, petitioners argued otherwise before the court of appeals. Petitioners argued that the court of appeals lacked jurisdiction because no final judgment had been entered in the underlying litigation establishing liability. Pet. App. 9a-13a. Indeed, petitioners explained that the appeal, for which they now seek this Court's review, was only filed out of "an abundance of caution." *Id.* at 9a.

Petitioners' previously expressed concerns that the "unique procedural posture" (Pet. App. 10a) of this case raises potentially significant jurisdictional and prudential barriers to review of the questions presented have merit. The district court's unusual handling of this litigation put the cart before the horse in the court of appeals. As petitioners' jurisdictional argument below explained, the present case involves an appeal of a damages judgment. But the indispensable predicate for that damages award—the liability judgment entered in the separate *Burns-Vidlak* litigation—is not a final judgment. At the time the court of appeals acted and at present, that case remains pending.[1]

The fact that the critical liability predicate for the present judgment remains non-final counsels strongly against an exercise of the Court's certiorari jurisdiction in this case. The basis for the court of appeals' rejection of petitioners' jurisdictional arguments is unclear. The court stated that the district court "incorporated by reference the reasoning and result of the *Burns-Vidlak*" class action opinion, rather than treating the appeals as involving further proceedings in the class action case. Pet. App. 12a. But, at the same time, the court of appeals noted (*id.* at 20a n.7) that the district court in the instant case (and all the individual cases) failed to grant the State's motion that it be permitted to contest the liability determination made in the class action, and instead "relied on * * * the *Burns-Vidlak* finding of unlawful discrimination." That determination cannot be readily reconciled with the court of appeals' conclusion that the individual actions were jurisdictionally independent. The court of appeals left entirely

[1] The docket reveals that the plaintiffs recently filed a "request for entry of final judgment."

unexplained how it could review by incorporation and affirm a liability judgment that the State was *not* permitted to contest in the trial court.

In addition, the court of appeals' supposition that the cases were jurisdictionally independent cannot be reconciled with the district court's certification of its judgment in each of respondents' cases under Federal Rule of Civil Procedure 54(b). See Pet. App. 9a. The only unresolved "rights and liabilities," Fed. R. Civ. P. 54(b), that could support such a certification are the issues pending in the *Burns-Vidlak* litigation.

That tangled procedural posture raises the possibility that the current judgment is not a final judgment in an Article III case or controversy, but rather an advisory opinion on the amount of damages that would be appropriate if the liability finding in a separate action is ultimately vindicated. In any case, whether the judgments in this case represent independent, final judgments or the partial implementation of non-final class action proceedings poses a novel jurisdictional question that this Court would have to decide before reaching the constitutional questions presented.

Furthermore, because the judgment is not yet final, the district court could alter or amend its judgment in the *Burns-Vidlak* litigation in a relevant manner for a variety of reasons, such as clarifying (in light of the pendency of *Hason*, for example) that the liability determination rests independently on Section 504 of the Rehabilitation Act. Indeed, it is the prospect of such changes rendering appellate review premature or advisory that in large part animates the final judgment rule. In this case, any subsequent changes could result in the Court's disposing of an important constitutional question on the basis of an incorporated, non-final liability judgment, even though the predicate for that

interim liability judgment ultimately could be eroded by subsequent proceedings in the original litigation.

Second, prudential reasons further counsel against indirectly reviewing the incorporated *Burns-Vidlak* liability determination because the State of Hawaii appears to have waived any Eleventh-Amendment based challenge to the abrogation provisions in the *Burns-Vidlak* case. See Pet. 6 n.5. While petitioners assert that the waiver was made before *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44 (1996), and was only made on behalf of Hawaii and not the government official sued in her official capacity (Pet. 6 n.5), three years *after Seminole Tribe* and in an appeal involving both the State of Hawaii and Director Chandler, petitioners left the Ninth Circuit with no doubt that they had abandoned their Eleventh Amendment immunity argument. "In the instant case," the court of appeals explained, "the State is not claiming sovereign immunity from suit in federal court. In fact, the state concedes that it is subject to suit, and answerable in money damages, in federal court on the appellees' Title II and Section 504 claims." *Burns-Vidlak* v. *Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999).[2] In light of petitioners' argument to the court of appeals in this case (Pet. App. 9a-13a) that the liability judgment was not final or reviewable until the *Burns-Vidlak* litigation concluded,

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[2] Petitioners cannot suggest that they were still unaware of their potential Eleventh Amendment defense under Title II in 1999. That is because, in early 1998, Hawaii joined an amicus brief in this Court arguing that *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), made it "doubtful" that Congress could have validly abrogated the States' Eleventh Amendment immunity to suits under Title II of the Disabilities Act. Brief of Amici Curiae State of Nevada et al. at 10-11, *Pennsylvania Dep't of Corrs.* v. *Yeskey*, 524 U.S. 206 (1998) (No. 97-634).

and thus that the liability judgment should be reviewed instead in the case where Eleventh Amendment immunity was "not claim[ed]," 165 F.3d at 1260, prudential considerations counsel against reviewing the Eleventh Amendment immunity question here. That is, in part, because consideration of the constitutional questions presented would be diverted by litigation over whether and how the court of appeals' incorporation of the class-action liability judgment, in which the sovereign immunity defense was not asserted and liability for damages was conceded for the class, affected petitioners' ability to assert the immunity as to individual class members. Cf. *Lapides* v. *Board of Regents of the Univ. Sys. of Ga.*, 122 S. Ct. 1640 (2002).

Third, not only is the liability determination in the underlying class action non-final, but the propriety of certifying the class is part of that pending non-final judgment. The question of whether district courts may appropriately certify a class action *after* a liability determination has been rendered, and then immediately direct every class member to file *individual* actions is, to say the least, open to question. If either the district court reconsiders before entering final judgment or the court of appeals on later review rules that class certification was improper, the very foundation for the present litigation would crumble. The liability predicate for the damages judgment would disappear. In addition, there is a serious question whether the district court could automatically incorporate the liability determination entered in an action between the State and two private parties into a case involving the State and different private parties, without allowing the State to defend against the liability judgment in the latter case. Cf. *United States* v. *Mendoza*, 464 U.S. 154, 162 (1984)

(federal government, unlike private litigants, is not subject to nonmutual offensive collateral estoppel).

Fourth, a ruling on the abrogation of immunity for Title II of the Disabilities Act would have no effect at all on petitioners' liability in this case. The relief awarded is independently supported by Section 504 of the Rehabilitation Act. As the court of appeals noted (Pet. App. 27a), the "same remedies are available for violations of Title II of the ADA and § 504." See 42 U.S.C. 12133 (providing that the remedies under Section 504 "shall be the remedies * * * this subchapter provides to any person alleging discrimination on the basis of disability in violation of" Title II of the ADA). Petitioners receive funds making them liable under Section 504, and the liability determination underlying the case (which, again, is an incorporated non-final determination from a different case that the State was not allowed to contest in this case) was premised on both Title II and Section 504. This Court should not exercise its certiorari jurisdiction for the purpose of granting ineffectual relief.

In sum, this case is in an interlocutory and procedurally confused posture such that it would not warrant an exercise of this Court's certiorari jurisdiction in its own right, especially since a grant of certiorari would be of no practical value to the petitioners. Accordingly, the Court could conclude that holding the case for *Hason* is not warranted.

2. Regardless of whether the first question is held for *Hason* and regardless of how *Hason* is resolved, the Court should deny certiorari on the second question presented by the petition. The court of appeals correctly held that Congress validly conditioned receipt of federal funds on a waiver of immunity to claims under Section 504 of the Rehabilitation Act. That holding

does not raise a significant or sustained conflict with any decision of any other court of appeals. Indeed, this Court recently denied a petition for a writ of certiorari on that same question in *Ohio Environmental Protection Agency* v. *Nihiser*, 122 S. Ct. 2588 (2002) (No. 01-1357).

a. The Rehabilitation Act expressly provides that "[a] State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973." 42 U.S.C. 2000d-7(a). Petitioners do not dispute (Pet. 20) that Congress has the power under the Spending Clause, U.S. Const. Art. I, § 8, Cl. 1, to condition the receipt of federal financial assistance on a State's waiver of its Eleventh Amendment immunity to Section 504 claims. See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 686 (1999); *Alden* v. *Maine*, 527 U.S. 706, 755 (1999). Nor do petitioners contend that the language of Section 2000d-7 failed to put them on clear notice that acceptance of federal funds would constitute a waiver of immunity to suit under Section 504.[3]

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[3] The courts of appeals have uniformly held that Section 2000d-7 unambiguously conditions receipt of federal funds on a waiver of Eleventh Amendment immunity. See *Koslow* v. *Pennsylvania*, 302 F.3d 161, 172 (3d Cir. 2002), petition for cert. pending, No. 02-801 (filed Nov. 19, 2002); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 553-554 (4th Cir. 1999), cert. denied, 528 U.S. 1181 (2000); *Pederson* v. *Louisiana State Univ.*, 213 F.3d 858, 875-876 (5th Cir. 2000); *Nihiser* v. *Ohio Envtl. Prot. Agency*, 269 F.3d 626, 628 (6th Cir. 2001), cert. denied, 122 S. Ct. 2588 (2002); *Stanley* v. *Litscher*, 213 F.3d 340, 344 (7th Cir. 2000); *Jim C.* v. *United States*, 235 F.3d 1079, 1081 (8th Cir. 2000) (en banc), cert. denied, 533 U.S. 949 (2001); *Douglas* v. *California Dep't of Youth Auth.*, 271 F.3d 812, 820, opinion amended, 271 F.3d 910 (9th Cir. 2001), cert. denied,

Instead, petitioners argue (Pet. 21-22) that their waiver of immunity to suits under Section 504 was not "knowing" because Congress had also abrogated the States' immunity from suit under a different law—Title II of the Disabilities Act, 42 U.S.C. 12131 *et seq.* Petitioners rely on the Second Circuit's decision in *Garcia* v. *State University of New York Health Sciences Center*, 280 F.3d 98 (2001), which held that the State's acceptance of clearly-conditioned funds "alone is not sufficient" to waive immunity, *id.* at 113-114; the question is whether the State "believed" the waiver would have any practical impact, *id.* at 115 n.5. The Court then reasoned that, because "the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, * * * since by all reasonable appearances state sovereign immunity had already been lost." *Id.* at 114 (citation omitted).

That argument does not merit further review. *Garcia* predated this Court's decision in *Lapides* v. *Board of Regents of the University System of Georgia*, 122 S. Ct. 1640 (2002), in which this Court held that a State's waiver of immunity turns upon its objective conduct (there, of removing a case to federal court), even though the State did not believe at the time it engaged in that conduct that it would result in a waiver of immunity. See 122 S. Ct. at 1645-1646. In so holding, this Court specifically refused to make the unequivocal waiver question turn upon the State's subjective beliefs. *Id.* at 1644-1645. "Motives are difficult to evalu-

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122 S. Ct. 2591 (2002); *Robinson* v. *Kansas*, 295 F.3d 1183, 1189-1190 (10th Cir. 2002); *Sandoval* v. *Hagan*, 197 F.3d 484, 493 (11th Cir. 1999), rev'd on other grounds, 532 U.S. 275 (2001).

ate," the Court explained, "while jurisdictional rules should be clear." *Id.* at 1645. *Lapides* casts such substantial doubt on *Garcia* that review of the *Garcia* rationale in this case, before the Second Circuit has reconsidered its position in light of *Lapides*, would be premature.

b. Petitioners further contend (Pet. 24-27) that Section 2000d-7's waiver of immunity does not extend to damages. Petitioners did not raise this argument below, it was not addressed by the court of appeals, and petitioners did not seek further review through a petition for rehearing. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); see also *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 527 (1994).

Moreover, despite their contention (Pet. 24-26) that their claim follows directly from *Lane* v. *Peña*, 518 U.S. 187 (1996), petitioners have not pointed to any decision by any court in the last six years that has adopted the claim that they now press. Review by this Court of a new claim that no court of appeals, including the court below, has ruled upon or even discussed would be premature.

In any event, petitioners' argument is wrong. The Eleventh Amendment is an immunity from suit for any form of relief, equitable or legal. See *Seminole Tribe of Florida* v. *Florida*, 517 U.S. 44, 58 (1996). By waiving their "Eleventh Amendment" immunity, petitioners necessarily waived their immunity to suit for any form of relief. Just as a sue-and-be-sued clause deprives a federal entity of any remnant of its sovereign immunity to damage actions, see *FDIC* v. *Meyer*, 510 U.S. 471, 480 (1994), Section 2000d-7(a)(1)'s unqualified abroga-

tion of sovereign immunity subjects the States that accept federal funds to such traditional judicial remedies as compensatory damages.

Section 2000d-7(a)(2) (see Pet. 25-26) does not help petitioners. That Section provides:

> In a suit against a State for a violation of [Section 504 and other specified civil rights statutes], remedies (including remedies both at law and in equity), are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

As the caption of Section 2000d-7 ("Civil rights remedies equalization") indicates, Section 2000d-7(a)(2) is intended to "equaliz[e]" the "remedies" available against a state defendant. That Section is not a response to sovereign immunity (which is entirely removed by subsection (a)(1)), but to the myriad other rules apart from the Eleventh Amendment that reflect the special status of States (but not other public and private entities) in the federal system. See, *e.g*, *Vermont Agency of Natural Res.* v. *United States ex rel. Stevens*, 529 U.S. 765, 787 (2000); *Gregory* v. *Ashcroft*, 501 U.S. 452, 461 (1991); *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989). Congress enacted that subsection to eliminate any possibility that those other rules might limit the remedies available against States even when sovereign immunity was removed. Cf. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981) (common law presumption against punitive damage awards against governmental entities).

Moreover, Section 2000d-7(a)(2) provides that a plaintiff may recover "remedies both at law and in equity" against a State "to the same extent as such

remedies are available for such a violation in the suit against *any* public or private entity other than a State" (emphasis added). It is well-established that damages are generally available against all private entities and most public entities (such as cities and school districts). See *Barnes* v. *Gorman*, 122 S. Ct. 2097, 2100-2101 (2002). And *Lane* made clear that the federal government could be sued for damages for violations of Section 504 when it was sued for its actions as a "provider" of federal funds. See 518 U.S. at 193. Therefore, damages *are* available against every public entity, both federal and local, in at least some circumstances, and are therefore available against the States.

Beyond that, petitioners' contention that their Eleventh Amendment immunity is removed by Section 2000d-7, but that no damages are available, would render the statute a practical nullity. *Ex parte Young*, 209 U.S. 123 (1908), already permits suits against state officials for prospective injunctive relief.

c. Finally, petitioners urge (Pet. 27-29) this Court to review whether there is a private right of action against state recipients of federal financial assistance for violations of Section 504. That argument also was not pressed by petitioners below or addressed by the court of appeals. Nor have petitioners pointed to any decision of any court of appeals that has addressed the issue. Review in this case therefore is not warranted.

In any event, Congress has made plain in the text and structure of the relevant statutes its intent to provide a private right of action against recipients of federal funds, including state recipients, for violations of Section 504. This Court has consistently held that Section 2000d-7 "ratified *Cannon* [v. *University of Chicago*, 441 U.S. 677 (1979)]'s holding" that a private right of action exists for the statutes identified therein.

Alexander v. *Sandoval*, 532 U.S. 275, 280 (2001); see *Barnes*, 122 S. Ct. at 2100; *Franklin* v. *Gwinnett County Pub. Schs.*, 503 U.S. 60, 72 (1992); *id.* at 78 (Scalia, J., concurring).

Furthermore, Section 2000d-7 does not stand alone. In 1978, Congress enacted Section 505(a)(2) of the Rehabilitation Act, which provides that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964, [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance * * * under section 794 of this title." 29 U.S.C. 794a(a)(2). Just last Term, this Court made clear that, based on Section 505(a)(2), "[b]oth [Section 504 of the Rehabilitation Act and Title II of the Disabilities Act] are enforceable through private causes of action" as evidenced by the incorporation of "the remedies available in a private cause of action brought under Title VI." *Barnes*, 122 S. Ct. at 2100.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the first question presented should be held pending this Court's decision in *California Medical Board* v. *Hason*, No. 02-479.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

RALPH F. BOYD, JR.
Assistant Attorney General

JESSICA DUNSAY SILVER
KEVIN RUSSELL
Attorneys

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No. 02-545

In The

Supreme Court of the United States

STATE OF HAWAII, et al.,

Petitioners,

v.

RICHARD K. LOVELL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

THOMAS R. KELLER
Acting Attorney General
DOROTHY SELLERS
CHARLES FELL
NANCY ALBANO
Deputy Attorneys General
425 Queen Street
Honolulu, HI 96813
(808) 589-1450

CHARLES J. COOPER*
MICHAEL W. KIRK
DEREK L. SHAFFER
COOPER & KIRK, PLLC
1500 K Street, N.W.,
Suite 200
Washington, DC 20005
(202) 220-9600

**Counsel of Record*

Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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I. THE COURT SHOULD HOLD THE FIRST QUESTION PENDING ITS DECISION IN *HASON*.

1. Because the Court has granted certiorari in *California Medical Bd. v. Hason*, No. 02-479, to review the first question presented in this case, it should follow its traditional practice of holding the question pending decision in *Hason*. Respondents' suggestion to the contrary rests largely upon the claim that the district court's judgments may not have been final. This argument is wholly without merit, for the district court entered a final judgment in favor of respondents and against petitioners awarding damages in a sum certain in each of the four cases now before this Court. *See* Pet. App. 56a, 69a, 72a, 73a. These orders, headed "JUDGMENT IN A CIVIL CASE," "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Cunningham v. Hamilton County,* 527 U.S. 198, 204 (1999) (citations and internal quotations omitted).

If, as the United States suggests, *see* Brief for the United States in Opposition ("U.S. Br.") 7-8, 10-11, the district court erred in resting its judgments in these cases upon *Burns-Vidlak*, such error would merely affect the *correctness* of the final judgments entered (an issue not before this Court and not affecting the jurisdiction of the court of appeals or this Court); it does not change the fact that the court did indeed enter final judgments in these cases.[1] If the *Burns-Vidlak* court were to alter its interlocutory decision in that case, or if it were reversed on appeal, *see id.* at 8, the judgments in this case would remain final

[1] The United States argues that the district court's reference to FED. R. CIV. P. 54(b) suggests that some "rights and liabilities" remain to be resolved, U.S. Br. 8, but fails to point out that the district court specifically concluded that Rule 54(b) certification was "'not required'" because the judgment awarding compensatory damages was final, and the court of appeals upheld that conclusion. Pet. App. 11a (quoting district court).

and Hawaii would have no recourse in these cases beyond that afforded by FED. R. CIV. P. 60(b) – an avenue of relief that is always available to a party subject to a final judgment. Thus, the court of appeals correctly held that it had jurisdiction, Pet. App. 9a-14a, and there is no basis to question this Court's jurisdiction.[2]

2. Respondents also argue that the State waived sovereign immunity in *Burns-Vidlak*. U.S. Br. 9-10; Brief of Respondents in Opposition ("Resp. Br.") 9-11. But they have offered no explanation for why a statement in *Burns-Vidlak*, made prior to class certification and before the State of Hawaii was joined as a defendant, should be construed as a waiver in the completely separate suits brought by respondents. *See* Pet. 6 n.5. At most, any waiver is limited to Burns-Vidlak's claim against Director Chandler. When the statement was made, respondents had not yet asserted their claims, nor had the court permitted Burns-Vidlak to assert their claims for them as a class representative, nor had Burns-Vidlak amended his complaint to bring a claim against the State.

Moreover, the statement giving rise to the alleged waiver was merely an accurate response to a question of law posed by the court in which counsel acknowledged damages were available against the State because Congress had abrogated sovereign immunity. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). A correct concession that under then-existing law Congress could unilaterally abrogate the State's immunity hardly constitutes a "voluntary invocation[] of federal jurisdiction," *Lapides v. Bd. of Regents*, 122 S. Ct. 1640, 1645 (2002), that would give rise to a waiver of sovereign immunity.

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[2] It is true, as respondents point out, that the State did draw the question to the attention of the court of appeals, but that in no way changes the fact that the judgments are final.

The United States seeks to avoid these dispositive points by suggesting that "three years *after Seminole Tribe* and in an appeal involving both the State of Hawaii and Director Chandler, petitioners left the Ninth Circuit with no doubt that they had abandoned their Eleventh Amendment immunity argument." U.S. Br. 9 (citing and quoting *Burns-Vidlak v. Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999)). But the referenced passage cites only the district court's opinion – *not* any statement by Hawaii on appeal. *See Burns-Vidlak v. Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999) (citing *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 770 (D. Haw. 1996) ("The State has admitted that if it violated section 504, it is liable to Plaintiffs for damages.")). And the district court cited only the statement made by counsel at the 1996 summary judgment hearing. *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 767 n.2 (D. Haw. 1996).

Respondents do not deny that the State raised its sovereign immunity defense in its answers in each of the cases before the Court in this petition, *see* Resp. Br. 10 (citing Pet. App. 82a, 84a, 86a, 88a), and it is settled circuit precedent that a State need only raise sovereign immunity in its answer to preserve it. *See, e.g., Demshki v. Monteith*, 255 F.3d 986, 989 (9th Cir. 2001). Nevertheless, the private respondents (but not the United States) appear to argue that petitioners waived sovereign immunity in their opening brief in the court of appeals. *See* Resp. Br. 10. They are mistaken: the State argued sovereign immunity on, *inter alia*, pages 38-41 of its opening brief.

Where, as here, the Ninth Circuit declined to reach respondents' waiver arguments, Pet. App. 18a, those arguments cannot support a departure from the Court's ordinary practice of vacating and remanding following a decision in another case on the question presented. There is no reason not to give the court of appeals the opportunity to address the waiver question in the first instance.

3. Finally, respondents argue that the Court need not hold the first question in this case for *Hason* because the judgments are independently supported by Section 504 of

the Rehabilitation Act. U.S. Br. 11; Resp. Br. 8-9. This argument fails for two reasons. First, as we explain *infra*, certiorari should be granted to resolve the circuit conflict on the Section 504 issue either in this case or in *Hawaii v. Vinson*, No. 01-1878, which involves only a Section 504 claim. Second, even if the Court concludes otherwise, it is still appropriate to hold this case in order to permit the court of appeals to reassess its decision in light of *Hason*. Title II and Section 504 are closely related, and this Court's additional instruction could shed new light on the Section 504 analysis. Indeed, the Ninth Circuit withdrew this case from submission to await this Court's ruling in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), and called for supplemental briefing after *Garrett* was decided even though that case did not directly address Section 504.

II. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE OR IN *VINSON* TO RESOLVE THE CIRCUIT SPLIT OVER THE SECTION 504 ISSUE.

1. Respondents do not deny that the decision below conflicts with the Second Circuit's decision in *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 114-15 (2d Cir. 2001). Nor do they dispute the importance, to all fifty States, of the question whether acceptance of federal funds effects a waiver of the States' sovereign immunity against private suits brought under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Nevertheless, the United States attempts to downplay this manifest circuit split by inaccurately suggesting that this Court's decision in *Lapides* has indirectly superceded *Garcia*. *See* U.S. Br. 13-14.

In *Lapides*, the Court held that a State's voluntary removal of an action to federal court effected a waiver of immunity from suit. 122 S. Ct. at 1646. The Court repeatedly emphasized the fact that Georgia had itself *voluntarily* chosen to have the suit heard in federal court by removing the action from state court. *Id.* at 1644; *see also id.* at 1645 ("this case involves a State that *voluntarily* invoked the jurisdiction of the federal court"); *id.* at 1646 ("removal is a

form of voluntary invocation of a federal court's jurisdiction sufficient to waive" sovereign immunity). The Court rejected Georgia's argument that "its motive for removal was benign," and not intended "to obtain litigating advantages for itself," *id.* at 1644, explaining that "[m]otives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 1645. In contrast to *Lapides*, New York in *Garcia*, and Hawaii in this case, were indisputably haled *involuntarily* into federal court.

In an ill-founded effort to discredit *Garcia*, the United States mischaracterizes the Second Circuit's reasoning, suggesting that the court's holding rested upon New York's subjective beliefs. U.S. Br. 13. In stark contrast to Georgia's argument in *Lapides*, however, the *Garcia* court did not purport to divine New York's subjective intentions at the time it accepted the federal funds said to have effected the waiver. Rather, the Second Circuit conducted an objective inquiry into whether the State's waiver should be deemed voluntary under the relevant circumstances. Because "the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, since *by all reasonable appearances* state sovereign immunity had already been lost." 280 F.3d at 114 (emphasis added) (citing *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)). Respondents do not deny that Hawaii's decision to accept federal funds cannot be distinguished from that of New York. Unless this Court grants review, irreconcilable conflict will persist between the Courts of Appeals as to whether there is a valid waiver of state sovereign immunity in such circumstances.

More generally, respondents are wrong to suggest that waiver of sovereign immunity may be inferred from, without more, (i) the language of 42 U.S.C. § 2000d-7(a)(1) purporting to abrogate Eleventh Amendment immunity in Section 504 cases, and (ii) the acceptance of federal funds. U.S. Br. 12; Resp. Br. 16. As both the Second Circuit and Judge O'Scannlain have demonstrated, this Court's cases have required more. *See Garcia*, 280 F.3d at 114; *Douglas v.*

California Dep't of Youth Auth., 285 F.3d 1226, 1228-31 (9th Cir.) (O'Scannlain, J., dissenting from the denial of rehearing en banc), *cert. denied*, 122 S. Ct. 2591 (2002). Specifically, this Court has emphasized the "fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress' expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-81 (1999).

Of course, Section 2000d-7(a)(1) speaks only to the latter (i.e., Congress' offer); as to the former (i.e., the effect of the State's action), the Court has laid down three principles that respondents would simply ignore: (i) "[s]tate sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected," *College Sav. Bank*, 527 U.S. at 682; (ii) "an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a *known* right or privilege,'" *id.* (citation omitted) (emphasis added); and (iii) "'[c]ourts indulge in every reasonable presumption *against* waiver' of fundamental constitutional rights," *id.* (citation omitted) (emphasis added). The Second Circuit and Judge O'Scannlain correctly concluded that application of these principles required analysis of the objective legal circumstances that existed when the State committed the act said to have waived its constitutionally guaranteed immunity. Such an inquiry is necessary to determine whether the acceptance of federal funds reasonably reflected an intentional decision to relinquish a known right.

Finally, private respondents' contention that Hawaii did not argue this point to the court of appeals, *see* Resp. Br. 16, is wholly without merit. Notably, the United States makes no such contention, for it is beyond question that Hawaii *did* press this argument below, and did so specifically with reference to *Garcia*. Pursuant to FED. R. APP. P. 28(j), Hawaii submitted a letter to the court of appeals on October 22, 2001, apprising it of the Second Circuit's then-recent decision in *Garcia*, and arguing that "'a state accepting conditioned federal funds could not have understood

that in doing so it was actually abandoning its sovereign immunity . . ., since by all reasonable appearances state sovereign immunity had already been lost.'" (quoting *Garcia*, 280 F.3d at 114). Hawaii made a similar argument in briefing submitted prior to *Garcia*. C.A. Brief for Defendant-Appellants in Response to Brief of Intervenor United States 23 ("Once the States' immunity has been abrogated, there is nothing left for an individual State to waive.") (citing *Pugliese v. Arizona Dep't of Health & Human Serv.*, 147 F. Supp. 2d 985, 991 (D. Ariz. 2001) (if immunity abrogated by ADA, no clear declaration of waiver under Section 504 was possible)).

2. Respondents maintain that Hawaii failed to argue below that 42 U.S.C. § 2000d-7(a)(2) is too ambiguous, *see Lane v. Pena*, 518 U.S. 187, 198 (1996), to invite a waiver of Hawaii's sovereign immunity with respect to liability for money damages. *See* U.S. Br. 14; Resp. Br. 14. To the contrary, Hawaii specifically argued, citing *Lane*, that neither the text of Section 2000d-7 nor that of Section 504 "clearly stated" the remedies available against the States for violation of Section 504, and thus Congress has not made "the States aware that the full panoply of damages . . . hang[s] over their sovereign heads." C.A. Supplemental Opening Brief of Defendant-Appellants (C.A. Supp. Br.") 9.[3]

On the merits, the United States would have the Court simply ignore 42 U.S.C. § 2000d-7(a)(2) (describing the remedies available "[i]n a suit against a State"), in considering whether Congress has clearly conditioned federal funds upon a waiver of sovereign immunity against private

[3] Respondents further suggest that the Ninth Circuit's failure to address the issue in its opinion militates against certiorari. U.S. Br. 14; Resp. Br. 14. But the Ninth Circuit has resolutely refused to conduct *any* legal analysis of the serious questions raised by private Section 504 suits for damages against the States, deeming the matter "foreclose[d]" by Circuit precedent. App. 16a; *see also Vinson v. Thomas*, 288 F.3d 1145, 1151 (9th Cir.) (issue "foreclosed"), *petition for cert. filed*, (U.S. June 20, 2002) (No. 01-1878).

damage suits. U.S. Br. 14-15. The Government is unable to cite any authority for this unprecedented suggestion,[4] and this Court's cases effectively repudiate it. In *Lane* itself, the Court expressly considered both subparagraphs (a)(1) and (a)(2) in the course of considering whether Section 2000d-7(a) effected a waiver of the federal government's sovereign immunity. 518 U.S. at 198-200. More generally, the Court's clear statement jurisprudence forecloses the narrow approach urged by the United States. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981).[5]

Finally, the United States complains that construing Hawaii's waiver as failing to embrace suits for money damages would "render the statute a practical nullity." U.S. Br. 16. If Section 2000d-7(a)(2) does not authorize damages suits against the States, the argument goes, it adds nothing, for suits for injunctive relief are already available under *Ex parte Young*, 209 U.S. 123 (1908). Both the premise and the conclusion the Government would draw from it are flawed. As to the conclusion, even if application of the clear statement rule would render the statute a "nullity," it does not follow that the rule should not be applied. The goal

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[4] The United States does cite *FDIC v. Meyer*, 510 U.S. 471, 480 (1994), in which the Court considered an unqualified sue-and-be-sued clause, but the statute there contained no second sub-paragraph limiting the available remedies against the sovereign.

[5] The United States briefly argues that Section 2000d-7(a)(2) unambiguously notified the States that damages are available because "*Lane* made clear that the federal government could be sued for damages for violations of Section 504 when it was sued for its actions as a 'provider' of federal funds." U.S. Br. 16. In fact, *Lane* said no such thing; after remarking on "the somewhat curious structure of the liability and remedy provisions" of the Rehabilitation Act, the Court simply observed that any waiver could not possibly extend "beyond the narrow category of § 504(a) violations . . . by 'Federal provider[s].'" 518 U.S. at 193. Far from concluding that Congress had clearly and unambiguously waived the federal government's immunity even in this "narrow category," the Court pointedly contrasted "[t]he lack of clarity in [the] 'Federal Provider' provision" with Congress' unambiguous waiver of liability for Section 501 claims. *Id.*

of the clear statement rule is not to divine the unexpressed intent of Congress; it is to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation" in a federal program. *Pennhurst*, 451 U.S. at 17. As to the premise: read in accordance with the clear statement rule, Section 2000d-7(a) invites waiver of sovereign immunity against suits seeking declaratory and injunctive relief brought directly against a State or its arm that would not be permissible under the *Young* doctrine. *See, e.g., Alden v. Maine*, 527 U.S. 706, 756-57 (1999).

3. Respondents do not deny that this Court has noted, but failed to reach, the "argument that implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear statement rule. . . . " *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656-57, 684-85 (1999) (Kennedy, J., dissenting)). Instead, the United States mistakenly claims that Hawaii did not raise this argument in the Court below. U.S. Br. 16. In fact, Hawaii made this argument *in terms* to the court of appeals: "the contract and clear statement rules regarding spending clause legislation compel the conclusion that the State of Hawaii cannot be deemed to have waived its constitutionally guaranteed immunity in cases where *Congress* has not expressly provided for the cause of action and the exact remedy in the *statute itself*." C.A. Supp. Br. 10 n.8 (citing *Davis*, 526 U.S. at 656-57 (Kennedy, J., dissenting)).

On the merits, the United States argues that Section 2000d-7 and Section 505(a)(2) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(2), satisfy the clear statement rule by approving implied causes of actions against the States. U.S. Br. 16-17. But this Court has instructed that a waiver of sovereign immunity will not arise unless Congress makes clear *in the text* of a statute that States accepting federal funds will specifically be subject to a cause of action. *Pennhurst*, 451 U.S. at 17. Neither Section 2000d-7 nor Section 505(a)(2) meets that high standard. No statutory text expressly states that *anyone* is subject to suit for violation of Section 504. In order to learn that private suits are

permitted, one must look beyond the United States Code to the United States Reports.

4. In the alternative, if the Court concludes that this case is an inappropriate vehicle for resolving the Section 504 question, then it should grant certiorari in *Hawaii v. Vinson*, No. 01-1878, a case presenting the same question, and hold this case pending resolution of *Vinson*. Because *Vinson* presents only the Section 504 question, the State previously suggested, in the interests of judicial economy, that the Court hold the *Vinson* petition pending consideration of this case in order to permit review of the closely related Title II and Section 504 questions together. Pet. 8-9 n.7. Now that the Court has granted certiorari on the Title II question in *Hason*, judicial economy would be equally well served by granting certiorari in *Vinson* or in this case; either course would allow the Court to take up the Section 504 question during the same Term that it decides the Title II question.

CONCLUSION

The first question should be held pending this Court's decision in *California Medical Bd. v. Hason*, No. 02-479. The petition for a writ of certiorari should be granted as to the second question. In the alternative, the second question should be held pending this Court's decision in *Hawaii v. Vinson*, No. 01-1878.

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Respectfully submitted,

THOMAS R. KELLER
Acting Attorney General

DOROTHY SELLERS
CHARLES FELL
NANCY ALBANO
Deputy Attorneys General

425 Queen Street
Honolulu, HI 96813
(808) 589-1450

CHARLES J. COOPER*
MICHAEL W. KIRK
DEREK L. SHAFFER

COOPER & KIRK, PLLC
1500 K Street, N.W., Suite 200
Washington, DC 20005
(202) 220-9600

**Counsel of Record*